Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOHN D. TOLAND *and* CHRISTAL TOLAND,
as husband and wife and d/b/a the John Toland Company,

Petitioners,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED
LIMITED PARTNERSHIP LITIGATION,
MDL DOCKET NO. 1005,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the representative parties of the class below violated the Tolands' right to due process by failing to adequately and fairly protect the interests of the Tolands in including them in the class definition even though the Tolands had *already opted out* of a previous class action and were in active arbitration.

2. Whether the class notice provisions violated the Tolands' right to due process by failing to provide the Tolands with the best notice practicable under the circumstances, given that they were *not* sent written notice of the class action even though they had been in arbitration with PSI for over two years, completed nine days of arbitration hearings, and filed a post-hearing brief.

LIST OF PARTIES

Petitioners:

John D. Toland, on behalf of himself, the estate of his deceased wife Christal Toland, and the John Toland Company

Respondents:

Prudential Securities Incorporated

Class Plaintiffs in *In re: Prudential Securities Incorporated Limited Partnership Litigation*, Southern District of New York, MDL Docket No. 1005

LIST OF PARENT COMPANIES

The parent company of Prudential Securities Incorporated, a respondent, is Prudential Insurance Company of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John D. Toland, on behalf of himself, his deceased wife Christal Toland, and the John Toland Company, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gave rise to this petition is unpublished by summary order of the Second Circuit. It is reprinted in the Appendix hereto at App. 1.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on December 27, 1996. Pursuant to Supreme Court Rule 13.1, the present petition is timely, having been filed within 90 days after the entry of judgment.

MacDaniel Jackson and Miriam Jackson, who were plaintiffs and appellants below but are not petitioners here, petitioned the Second Circuit for rehearing, which the Second Circuit denied by order entered January 27, 1997. App. 58. Pursuant to Supreme Court Rule 13.3, the present petition is timely, having been filed within 90 days after the denial of the petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, § 1 (Due Process Clause)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

The certification and settlement of the class action multidistrict litigation ("MDL") below violated the Tolands' right to due process in two ways.

First, the representative parties of the class did *not* adequately and fairly protect the interests of the Tolands. This is apparent from the overly broad scope of the class definition. It covered investors, like the Tolands, who had *already opted out* of another MDL covering the *same* investments. It should not have, as those investors obviously preferred individual arbitration over class-wide relief. The Tolands, like many others who opted out of the Louisiana MDL, filed arbitration claims. They remained in active arbitration at the time that the class in the New York MDL was proposed and certified. This information was available to class counsel, the Southern District of New York, and respondent Prudential Securities Incorporated ("PSI"). Despite this, the class definition was drafted to include the Tolands. By opting out of the

previous class, and certainly by filing an arbitration, the Tolands demonstrated their desire to be *excluded* from class litigation. An MDL with a class definition covering them and those in similar situations should not have been certified.

Second, the best class notice practicable under the circumstances was not sent to the Tolands, in violation of Rule 23 of the Federal Rules of Civil Procedure and their right to due process. The Tolands, who invested $450,000 in the subject securities, were *not* sent written notice of the class. This was true even though they had been in arbitration with PSI for over two years, completed nine days of hearings, and filed a post-hearing brief. PSI argued below that an informal comment made by its arbitration counsel sufficed as notice. It did not. This is discussed more thoroughly below.

The touchstones of due process in the class context are adequacy of representation and notice. 2 Newberg on Class Actions § 11.63, at 11-171-72. The above two shortfalls conflict with the due process standards set forth by this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); and *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). *See* Sup. Ct. R. 10(c). Thus, they warrant reversal.

Jurisdiction Below

Jurisdiction in the United States District Court for the Southern District of New York was conferred by 18 U.S.C. § 1961 *et seq.*, as stated in the consolidated complaint. The Southern District of New York had jurisdiction over the

common law claims pursuant to the principles of supplemental jurisdiction, 28 U.S.C. § 1367(a), as stated in the consolidated complaint.

Jurisdiction of the appeal in the United States Court of Appeals for the Second Circuit was proper because the appeal was from a denial of a motion under Rule 60 of the Federal Rules of Civil Procedure for relief from a final judgment. *See National Student Marketing Litigation v. Barnes Plaintiffs*, 530 F.2d 1012 (D.C. Cir. 1976); *Plotkin v. Pacific Telephone and Telegraph Co.*, 688 F.2d 1291 (9th Cir. 1982). Also, the order of the Southern District of New York contained an injunction, which was appealable to the Second Circuit under 28 U.S.C. § 1292(a). Timely notice of appeal to the Second Circuit was filed with the Southern District of New York.

Background Facts

This petition flows from the biggest alleged fraud scheme in the history of the securities industry: the marketing of oil-and-gas investments known as the Prudential-Bache Energy Income Fund limited partnerships. During the 1980s, PSI sold the partnerships to over 130,000 account holders for over $1.4 billion. *In Re Prudential-Bache Energy Income Partnerships Securities Litigation*, MDL Docket No. 888 ("Louisiana MDL") (E.D. La. Feb. 3, 1994) (Findings of Fact and Conclusions of Law at 1, ¶¶ 1-2) (lodged with this Court upon filing of petition). Those account holders included the Tolands. A *Business Week* article published in 1991 about the partnerships set off a wave of class actions in several states. The class actions were twice consolidated for pretrial purposes

under the federal multidistrict litigation statute, 28 U.S.C. § 1407. The first multidistrict litigation (*i.e.*, the above Louisiana MDL) was consolidated before the Eastern District of Louisiana, which entered a judgment upon a settlement agreement in February of 1994. App. 24. The second multidistrict litigation (the "New York MDL") was thereafter consolidated before the Southern District of New York, which entered a judgment upon a settlement agreement in November of 1995. This petition arises from the New York MDL, by way of the United States Court of Appeals for the Second Circuit.

The Tolands were originally members of the Louisiana MDL. App. 11. They received notice of a proposed settlement of the Louisiana MDL in January of 1993 and timely opted out. *Id.* In June of 1993, after opting out of the Louisiana MDL, the Tolands filed an arbitration with the American Arbitration Association. *Id.* The original respondents in that arbitration included PSI and its parent company, Prudential Insurance Company of America ("PI"). App. 11-12. In September of 1993, the Tolands and the two Prudential respondents entered into a private agreement whereby they agreed that: the Tolands would dismiss PI from the arbitration and would not attempt to compel it to arbitrate in the future; and in return, the remaining respondents – including PSI – would "voluntarily submit to and [ ] remain parties" in the arbitration to its resolution. App. 12. The Tolands' counsel confirmed that PSI and the other non-PI respondents were "expected to remain viable and available for the resolution of any judgment which should result from the arbitration proceedings." *Id.*

Thereafter, the following events unfolded: the original settlement of the Louisiana MDL was rejected by the Eastern District of Louisiana; a second settlement was reached, which was approved in February of 1994; notice of the second settlement was sent out ten days after PI was dismissed from the Tolands' arbitration; Mr. Toland did not receive the notice of the second settlement; and neither he nor his counsel submitted a new opt out form. *Id.*

In the meantime, the Tolands' arbitration continued, they spent approximately $100,000 on it, and no mention was made of the Louisiana MDL settlement. *Id.* In July of 1995, the claims administrator in the Louisiana MDL sent Mr. Toland a settlement check. *Id.* The Tolands' counsel returned the check, explaining that the Tolands were in arbitration by agreement with PSI. *Id.*

(The Tolands moved for permission before the Second Circuit – and the Southern District of New York before that – to apply to the Eastern District of Louisiana regarding their status in the Louisiana MDL. *Id.* The Second Circuit denied the motion, saying that the Tolands consistently argued that they opted out of the Louisiana MDL and were in the New York MDL. App. 12 & 14.)

The terms of the New York MDL settlement excluded the members of the Louisiana MDL. App. 13. Presumably because the Tolands did not opt out of the second Louisiana MDL settlement, they were recorded as members of the Louisiana MDL, and no notice of the New York MDL settlement was sent to them. *Id.* Class counsel verified that the Tolands' names were not provided to the

administrators, and the notice administrators confirmed that they sent no notice to the Tolands. *Id.* The Tolands did not receive the written notice of the class action below until PSI filed a motion before the arbitral panel on November 30, 1995 – one month after the opt-out deadline – to stay the arbitration based on the final order of the Southern District of New York. *Id.* The panel stayed the arbitration, and the Tolands moved for relief from the judgment of the Southern District of New York. *Id.*

PSI argued below that adequate notice of the New York MDL existed because their arbitration counsel had mentioned the New York MDL to the Tolands' counsel before the opt-out deadline, at the beginning of an arbitration hearing in Dallas. The parties did not dispute the existence of the conversation. They did dispute its substance, and still do, as discussed hereinafter.

REASONS FOR GRANTING THE PETITION

I.

THE REPRESENTATIVE PARTIES OF THE CLASS DID NOT ADEQUATELY AND FAIRLY PROTECT THE INTERESTS OF THE TOLANDS.

Adequacy of representation means class counsel are qualified and the class members do not have interests "antagonistic" to one another. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). It is based on Rule 23(a)(4) of the Federal Rules of Civil Procedure and on the Due Process Clause of the Fourteenth Amendment. The Tolands do not challenge the qualifications of

class counsel. They contend that class members had interests antagonistic to those of the Tolands. Were the interests in harmony, the class below would never have been certified to include account holders, like the Tolands, who had already opted out of the Louisiana MDL to pursue individual arbitration.

Of the over 130,000 account holders who purchased the oil-and-gas partnerships, slightly less than 16,000 opted out of the Louisiana MDL. Louisiana MDL (Feb. 3, 1994) (Findings of Fact and Conclusions of Law at 2, ¶ 2) (lodged with this Court upon filing of petition). They did so to pursue other avenues of relief, such as individual arbitration. This was consistent with the first notice sent to class members in the Louisiana MDL, which said, "If you elect to be so excluded, you shall be free to pursue on your own behalf whatever legal rights you may have against the Released Parties." Louisiana MDL (Nov. 9, 1992) (Notice of Pendency of Class Actions at 6, ¶ 23(b)) (lodged with this Court upon filing of petition). Having made the decision to opt out of the Louisiana MDL, the Tolands' interests were not served by their inclusion in yet another MDL. Instead, that inclusion led to the Tolands and several other account holders losing, by unfortunate happenstance and against their wishes, their rights to pursue other avenues of relief. To make matters worse, the Tolands, after more than two years of arbitration, had conducted nine days of arbitration hearings and filed a post-hearing brief. To make matters still worse, the Tolands stand to receive over 20% *less* from the New York MDL than from the Louisiana MDL. From the New York MDL, they stand to receive $41,228.86. App. 64. From the Louisiana MDL, their check was in the amount of

$52,299.36. App. 67. Certifying a class action to afford opted out account holders *less* than they could have received through previous class litigation does not serve their interests. In light of the above, the Tolands' inclusion in the class definition of the New York MDL constitutes inadequate representation and a violation of their due process rights. Therefore, it warrants reversal.

The Tolands raised the adequacy of representation issue below, before the Southern District of New York. They were time-barred from appealing to the Second Circuit from the order certifying the class, on which the inadequacy of representation argument is based. That order was dated November 20, 1995. App. 34 & 42. The 30 day period to file a notice of appeal under Rule 4 of the Federal Rules of Appellate Procedure expired before the Southern District of New York denied the Tolands' petition for relief from the order on January 23, 1996. App. 43. If there was question about this, it was resolved by the Second Circuit. MacDaniel and Miriam Jackson, who were appellants below, along with the Tolands, included the class certification order in their notice of appeal. App. 45 & 48. PSI moved to dismiss their appeal to the extent that it included the order. App. 57. The Second Circuit granted the motion. App. 56. Though this Court does not normally decide issues not presented below, it is not precluded from doing so and has done so where justice so required. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Justice so requires here, based on the above timing of events and the merit of the above reason for granting this petition. Furthermore, once an issue is raised below, as the inadequacy of representation issue was raised before the Southern District of New York, a party is free to

formulate, in this Court, any argument in support of that claim, including a claim based on the certification of the class. *Yee v. City of Escondido*, 503 U.S. 519, 520 (1992). The above reason for granting this petition is, therefore, properly before the Court.

II.

THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES WAS *NOT* SENT TO THE TOLANDS AS ABSENT CLASS MEMBERS.

Rule 23(c)(2) of the Federal Rules of Civil Procedure says that the members of a class action must be provided with the "best notice practicable under the circumstances, including *individual notice* to all members who can be identified with a reasonable effort." (Emphasis added.) Class members must also be notified of a proposed class settlement per Rule 23(e). Rule 23 encompasses the due process requirements of the Fourteenth Amendment.

In *Eisen*, this Court, under a due process analysis, interpreted Rule 23 literally, saying, "Individual notice *must be sent* to all class members whose names and addresses may be ascertained through reasonable effort." *Id.*, 417 U.S. at 173 (quoting from Advisory Committee's Note to Rule 23) (emphasis added). In *Mullane*, this Court said that, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314 (emphasis added). "A mere gesture is not due process," this Court continued. *Id.*

"The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*

Where such notice is not provided, a judgment must be vacated as void. 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2862, at 326-29 (2d ed. 1995) (judgment "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties or if it acted in a manner inconsistent with due process of law."); *see also Simmer v. Rios*, 661 F.2d 655, 663-64 (7th Cir. 1981); *Pittston Co. v. Reeves*, 263 F.2d 328 (7th Cir. 1959); *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385 (S.D.N.Y. 1986); *Miller v. Steinbach*, 263 F. Supp. 255, 283 (S.D.N.Y. 1967).

The Tolands petitioned the Southern District of New York, for relief from its Order and Final Judgment, under Rule 60(b)(4) of the Federal Rules of Civil Procedure. That rule provides an avenue for a court to afford relief to a person as to whom a judgment is void. If a judgment is void as to a party, relief is *mandatory*, not discretionary. 11 C. Wright § 2861, at 322-24; Newberg § 11.63, at 11-171-7; *Silber v. Mabon*, 957 F.2d 697, 700 n.3 (9th Cir. 1992).

The method used to gather the names and addresses for the members of the New York MDL is set forth in an affidavit by G. Peter Buchband. App. 28. Mr. Buchband was the president of the Garden City Group, Inc. ("GCG"), the claims administrator for the settlement of the New York MDL. *Id.* Mr. Buchband says that PSI provided the GCG with magnetic tapes of the names and addresses for the purchasers of the limited partnerships. *Id.* He also says that the data was "filtered" to exclude purchasers deemed ineligible

to participate in the settlement, *i.e.*, those who had released PSI in some prior proceeding. App. 29. No special step was taken, however, to ensure that those investors who had *already opted out* of the Louisiana MDL and were in *active arbitration* received written notice of the New York MDL. This violated the Tolands' right to due process.

In *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), the Fifth Circuit rejected reliance on a computer-generated list similar to the one used in the New York MDL which was found to be both over-inclusive and under-inclusive, and, instead, required an examination, by hand, of 1,700,000 index cards to identify the names of putative class members. "The key," said the court, "is reasonable effort, and a large class requires a large effort." *Id.* 552 F.2d at 1099-1100. Here, less than 16,000 oil-and-gas partnership investors opted out of the Louisiana MDL. Louisiana MDL (Feb. 3, 1994) (Findings of Fact and Conclusions of Law at 2, ¶ 2) (lodged with this Court upon filing of petition). That is less than 1% of the number involved in *Nissan*. From that amount, several claims had been settled by numerous arbitrations and an SEC settlement fund established for the purchasers of the oil-and-gas partnerships.

As mentioned above, the Tolands were in arbitration with PSI for over *two years*. Their names and addresses, for notice purposes, could have been ascertained through reasonable effort, as required by Rule 23(c)(2) and due process standards. Despite this, PSI did *not* provide the Tolands' names and address to the claims administrator, which in turn did not provide written notice to the Tolands.

The Second Circuit said that the Tolands' omission from the mailing list was not determinative because publication notice was afforded and their counsel received personal notice. App. 13-14.

"Publication notice" refers to the publication of summary notice in three newspapers. App. 5. That was not enough to satisfy due process standards. *Silber*, 18 F.3d at 1455 (court "cannot simply rely on notice by publication.") (citing *Mullane*, 339 U.S. at 319); *Eisen*, 417 U.S. at 174-75 (citing *Schroeder v. City of New York*, 371 U.S. 208 (1962)); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Contract Buyers League v. F & F Investment*, 48 F.R.D. 7, 15 (N.D. Ill. 1969).

"Personal notice" refers to the comment made by PSI's arbitration counsel about the New York MDL. It, too, was not enough. In *Mullane*, this Court said that, "[t]he notice must be of such a nature as reasonably to *convey the required information.*" *Id.*, 339 U.S. at 314-15 (citations omitted). The comment of PSI's arbitration counsel did not convey the required information. PSI's version of the comment is contained in the affidavit of their arbitration counsel, who did not appear personally before the Southern District of New York. App. 60. He says that he (1) *asked* the Tolands' counsel whether the Tolands received a notice in the New York MDL (but *not* that he *told* him they were included in the class definition)[1]; (2) told him the opt-out date; (3) suggested that he

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[1] The Second Circuit said, incorrectly, "According to his affidavit, PSI's lawyer proceeded to *tell* the Tolands' lawyer about the Tolands' membership in the class. . . . " App. 13. (emphasis added). Actually, according to the affidavit, PSI's

call PSI's assistant general counsel; (4) admitted that the Tolands' counsel asserted, without contradiction from PSI's counsel, that it did not apply to the Tolands because the parties had agreed to arbitrate the matter. App. 61. Even taking the affidavit of PSI's arbitration counsel as entirely true, it does *not* assert that he conveyed the information required to satisfy due process standards.

PSI's arbitration counsel did *not* convey that the New York class action was another MDL with another class definition that covered the Tolands' claims *even though they had already opted out of the Louisiana MDL*. PSI's arbitration counsel refers to the New York MDL, in his affidavit, as a "class action," not an MDL. *Id.* As mentioned above, PSI's sale of the oil-and-gas partnerships was the biggest alleged fraud in the history of the securities industry. It sparked several class actions in several states. Mentioning one more state class action was not the equivalent of mentioning another MDL covering the Tolands' claims.

Moreover, at the time of the comment, PSI had already committed to arbitrate the Tolands' case to its resolution in exchange for the release of another Prudential entity (PI). App. 12. PSI also never disputed the casual nature of the comment, which was made while counsel were unloading boxes before a four-day arbitration hearing. He did *not* formally mention it moments later and on the record, when the hearing started. In light

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lawyer *asked* the Tolands' lawyer "if Claimants had informed him of their receipt of the Notice relating to the class action encompassing their claims in the arbitration proceeding." App. 61.

of all of the above, the failure to identify the Tolands and send them written notice of the New York MDL violated the Tolands' right to due process.

Because the Tolands were not provided with the best notice practicable under the circumstances and because they were not afforded with notice and an opportunity to be heard, as required by Rule 23(c)(2), *Mullane*, and *Eisen*, the Final Order and Judgment of the Southern District of New York is void as to the Tolands and must be vacated as to them pursuant to Rule 60(b)(4). The Second Circuit erred in holding contrary and should be reversed.

Respectfully submitted,

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APPENDIX

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SUMMARY ORDER OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (DEC. 27, 1997) .....App. 1

JUDGMENT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA (FEB. 3, 1994) .....App. 24

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27 day of December, one thousand nine hundred and ninety-six.

PRESENT: HON. ELLSWORTH A VAN GRAAFEILAND,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
Circuit Judges.

In Re: PRUDENTIAL SECURITIES INC. LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005.,

---

MATT NILSON, DAVID MATUS, MELINDA MATUS, LESLIE BISHOFBERGER, DOROTHY BISHOFBERGER, THOMAS BARRETT, JAMES M. BARRETT, REBECCA BARRETT, Executrix of the Estate of James Barrett, CARL ROBA, JAY JABLONSKI, VINCENT LAZARA, and JEFFREY A. SCHILLER,

Movants-Appellants,

95-9209(L), 96-7147(c),
-v.- 96-7159(c), 96-7235(c),
96-7199(c), 96-7197(c),
96-7277(c)

PRUDENTIAL SECURITIES INC.,

Respondent-Appellee.

JOHN D. TOLAND and CHRISTAL TOLAND, as husband and wife and d/b/a The John Toland Company, MACDANIEL JACKSON, MIRIAM JACKSON,

Plaintiffs-Appellants,

-v.-

IN RE: PRUDENTIAL SECURITIES INC. LIMITED PARTNERSHIP LITIGATION,

Defendant-Appellee.

APPEARING FOR MOVANTS-APPELLANTS AND PLAINTIFFS-APPELLANTS:	SETH LIPNER, Deutsch & Lipner (Paula Schwartz Frome, Jerome Ferguson, Neil Chamberlin, Archibald M. Mull III, on the brief), Garden City, NY.
APPEARING FOR RESPONDENT-APPELLEE PRUDENTIAL SECURITIES, INC.:	THOMAS J. KAVALER, Cahill Gordon & Reindel (Mathias E. Mone, John M. McSherry on the brief), New York, NY.

APPEARING FOR RESPONDENT-APPELLEE CLASS PLAINTIFFS: LAWRENCE A. SUCHAROW, Goodkind Labaton Rudoff & Sucharow, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Pollack, *J.*).

(Filed December 27, 1996)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court are **AFFIRMED** in all respects.

I. Background

These consolidated appeals are taken from a series of orders denying the appellants' motions, pursuant to Fed.R.Civ.P. 6(b) and 60(b), to enlarge their time to opt out of a class action settlement, or for relief from the final judgment, for excusable neglect. Although the facts and governing legal principles vary, all of the appellants were pursuing or wish to pursue arbitration remedies against the class action defendant, and by virtue of the orders appealed from are now enjoined from pursuing arbitral remedies, or indeed any recovery other than pursuant to the class action settlement.

In May 1994, several class actions against Prudential Securities, Inc. (PSI) were consolidated in the Southern District of New York (Pollack, *J.*). The plaintiffs filed a consolidated complaint in June 1994, in which they

asserted RICO and common law claims arising out of fraud by PSI in the organization, marketing, sale, and operation of over 700 partnerships sold during the 1980s.

The settlement reached in August 1995 provided *inter alia* that PSI would pay $110 million into a settlement fund for the benefit of the class, and that PSI would be released from:

> any and all claims, rights or causes of action or liabilities whatsoever . . . including both known and unknown claims, that have been, could have been, or in the future might be asserted in any forum by the Class Members or any of them or the successors and assigns of any of them, whether directly, indirectly, representatively, derivatively or in any other capacity, against any of the Released Parties [including PSI], in connection with or which arise out of or relate in any way to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth or referred to in the Consolidated Complaint, or which relate in any way to the marketing, purchase, sale or holding of . . . any of the Partnerships during the Class Period.

The settlement also included a so-called "blow provision," which provided that if class members asserting in the aggregate more than $10 million in claims opted out of the class by the opt out deadline, PSI had the right to withdraw from the settlement.

Notice of the settlement was mailed to approximately 275,000 class members in early October 1995. The notice stated that the opt out deadline was October 30, 1995, and warned:

> If you have pending your own claim or action against any person or entity in connection with an investment in any of the Partnerships (as defined [therein]), you should consult with the attorney representing you, as this Consolidated Action, the certification of the Class, the proposed partial settlement, and this Notice may affect your claim or your action. . . .
>
> THE RELEASE TO BE GIVEN TO THE PSI SETTLING DEFENDANTS AND THE RELEASED PARTIES IS VERY BROAD AND MAY IMPACT UPON OTHER RIGHTS OR CAUSES OF ACTION YOU MAY HAVE.

Summary notice was published twice in the national editions of the *New York Times*, the *Wall Street Journal*, and *USA Today*. The 10,926 people who responded to the published notice received the full notice by mail.

By the October 30 deadline, opt outs had been filed by class members having claims that exceeded $10 million dollars. PSI therefore had the right, under the blow provision, to walk away from the settlement, and had until November 16, 1995, to make that election. PSI declined to exercise its right to abandon the settlement, and the court proceeded to a fairness hearing on November 17, 1995.

On November 20, 1995, the district court entered a final judgment: 1) certifying a settlement class, 2) approving the settlement, 3) dismissing all settled claims by class members against the released parties on the merits and with prejudice, and 4) enjoining class members from instituting, commencing, or prosecuting any action or

proceeding regarding any of the settled claims against any of the released parties.

After the entry of final judgment, the district court addressed a series of motions under Fed.R.Civ.P. 6(b) and 60(b) for relief from the final judgment and for permission to opt out belatedly. In four instances, the district court invited PSI to reconsider its opposition to the motions. As to those four claimants, PSI withdrew its opposition and allowed them to opt out. The district court denied the remaining motions, and this appeal followed.

II. Discussion

On a motion for a late opt out, a district court must determine 1) whether the movant's neglect was excusable, and 2) whether either party would be substantially prejudiced by the court's action. *See Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir.1974) (per curiam). This determination rests within the district judge's discretion, and we reverse only for abuse of that discretion. *Id.*

PSI claimed prejudice based on its expectation of finality, arguing that PSI had bargained for and paid $110 million for finality and repose that would be defeated or diminished by late opt outs. The appellants argue that PSI is not prejudiced, because their delay did not impair PSI's ability to exercise its election under the blow provision. They also contend that the prejudice to each appellant by denying the late opt outs far outweighs the prejudice to PSI of having to pay out an additional two or three million dollars in addition to the $110 million settlement.

Although PSI was free to make its election under the blow provision – the $10 million floor having been reached – PSI made its decision to proceed with the settlement in part on the basis of how many claims of what estimated value would remain. Therefore, PSI is (at least marginally) prejudiced by additional, late opt outs, because such late claims increase the liability exposure that the settlement was intended to limit.

We think that PSI's prejudice argument has some force, and that the district court did not err in deciding that each motion granted would cause some prejudice to PSI, and should therefore be evaluated in light of that background assumption.

A. Matt Nilson

Matt Nilson invested $284,754 in partnerships. In June 1993, he initiated an arbitration against PSI. Hearings were held in December 1994; the arbitration was then adjourned until January 1995, and later rescheduled for December 1995 at PSI's request.

Nilson's office staff received notice of the class action on or around October 23, 1995, one week before the opt out deadline of October 30. When the notice was received, Nilson himself was travelling abroad, and was scheduled to return for the arbitration hearings in early December. His staff, under the mistaken belief that no action need be taken until December 15, 1995, did not contact Nilson or his attorney. No opt out was timely filed.

On November 7, 1995, after the opt out deadline, PSI contacted Nilson's lawyer to find out whether Nilson had opted out. Informed that Nilson had not done so, PSI stated its intention to move for a stay of arbitration. On November 8, 1995, Nilson's counsel – who had timely opted other clients out of the class – sent a request for exclusion to the claims administrator.

On November 16, 1995, Nilson moved for permission to file an untimely exclusion request, so that he could continue his individual arbitration. The district court denied the motion at a hearing on November 29, 1995, emphasizing that Nilson's attorney had timely opted out on behalf of another client, and that the failure to opt out on Nilson's behalf could therefore be construed as a deliberate choice.

We conclude that the district court did not abuse its discretion in denying Nilson's request for a late opt out. Regardless of what Nilson's lawyer may or may not have done on behalf of other clients, Nilson failed to demonstrate that his own neglect was excusable: notice was timely sent to his office, which simply ignored it. Nilson's pending arbitration does not excuse his failure to opt out. The release (provided as a part of the notice) cautioned that anyone who had "pending your own claim or action against any person or entity in connection with an investment in any of the Partnerships" should check with a lawyer to determine whether that action would be affected. Nilson, or those he entrusted with his affairs while he was out of the country, chose not to do so.

B. The Matuses

David and Melinda Matus invested $93,000 in PSI partnerships, and initiated a NYSE arbitration against PSI in April 1994. They received the class action notice on October 21, 1995, but did not inform counsel or respond, apparently believing that no action was necessary.

Arbitration hearings in San Diego continued from October 25th to the 27th, 1995. PSI participated without requesting a stay. On October 30, 1995, on the ground of witness unavailability, PSI requested an adjournment until December 1995. The opt out date was not mentioned during the arbitration proceedings. On November 7, PSI called the Matuses' attorney to find out whether they had opted out by the deadline. Advised that they had not, PSI stated its intention to move for a stay. On November 9, the Matuses' counsel – who had timely opted out on behalf of other clients in the class – sent an opt out request to the claims administrator.

On November 16, 1995, the Matuses – along with Nilson – moved for permission to file an untimely exclusion request, in order to proceed with their individual arbitrations. As with Nilson, the district judge noted that the Matuses' attorney had timely opted out other clients, and concluded that the Matuses had made a deliberate choice to remain a part of the class. The motion was therefore denied on November 29, 1995.

We conclude that the district court did not abuse its discretion in finding that the Matuses had not demonstrated excusable neglect. Whether or not the failure of the Matuses' counsel to opt out on their behalf supports an inference of deliberate choice, the notice expressly

stated that potential class members who had "pending [their] own claim or action against any person or entity in connection with an investment in any of the Partnerships" should check with their lawyer. The Matuses, so warned, did nothing to protect their rights. We cannot say that the district court's denial of their motion was an abuse of discretion.

C. The Jacksons

MacDaniel Jackson, a former Dallas employee of PSI, invested $300,000 in partnerships. In November 1994, Jackson and his wife moved to North Carolina. Mr. Jackson advised PSI of his address change orally and in writing. On January 12, 1995, Mr. Jackson filed an arbitration proceeding regarding both his investment in partnerships as well as the loss of $100,000 in life insurance policies that allegedly had been churned by Prudential Insurance.

PSI sent notice of the class action to Mr. Jackson in care of PSI's Dallas office. An employee in PSI's Dallas office stated by affidavit that it was his common practice to forward mail to Mr. Jackson the day it was received or the next day, and that he had not withheld forwarding the class notice. Mr. Jackson's affidavit indicates that he did not receive the forwarded notice until December 7, 1995. On or about the same date, the Jacksons' counsel received a letter from PSI demanding that the Jacksons dismiss their arbitration proceeding.

The Jacksons moved to be excluded from the class in order to proceed with their individual arbitration claim,

arguing that PSI's failure to provide the claims administrator with the proper address constituted sufficient grounds for extraordinary relief.

At the January 18 hearing, the district court denied the Jacksons' motion, noting that "I almost had the impression . . . that [Mr. Jackson] maybe caught himself after this thing after sitting on his duff after delaying letting you know about it before."

As the movants, the Jacksons had the burden of proof as to excusable neglect. The district court has evidently inferred from the affidavit of the PSI employee in Dallas that timely notice was sent, and has expressed skepticism concerning Jackson's claim that he did not receive notice until the deadline had expired. There has been no abuse of discretion.

D. The Tolands

Christal Toland, now deceased, and her husband John purchased a $450,000 interest in PSI's Energy Income Fund Partnerships. The Tolands were originally members of a class of purchasers in In Re Prudential-Bache Energy Income Partnerships Securities Litigation, MDL No. 888, a multi-district class action in the United States District Court for the Eastern District of Louisiana (Livaudais, *J.*) (the "Louisiana class action"). However, the Tolands received notice of a proposed settlement of the Louisiana class action in January 1993, and timely opted out of that class.

In June 1993, the Tolands filed an arbitration with the American Arbitration Association. The original respondents in that arbitration included PSI and its parent

company, Prudential Insurance Company of America ("PI"). In September 1993, the Tolands and the two Prudential respondents agreed that: the Tolands would dismiss PI from the arbitration and would not attempt to compel it to arbitrate in the future; and in return, the remaining respondents – including PSI – would "voluntarily submit to and [ ] remain parties" in the arbitration to its resolution. Tolands' counsel confirmed that PSI and the other non-PI respondents were "expected to remain viable and available for the resolution of any judgment which should result from the arbitration proceedings."

Thereafter, the following events unfolded: the original settlement of the Louisiana class action was rejected by the Eastern District of Louisiana; a second settlement was reached, which was approved in February 1994; notice of the second settlement was sent out ten days after PI was dismissed from the Tolands' arbitration; Mr. Toland did not receive the notice of the second settlement; neither he nor his counsel submitted a new opt out form.

In the meantime, the Tolands' arbitration continued, they spent approximately $100,000 on it, and no mention was made of the Louisiana settlement. In July 1995, the claims administrator in the Louisiana class action sent Mr. Toland a settlement check. The Tolands' counsel returned the check, explaining that the Tolands were in arbitration by agreement with PSI.[1]

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[1] Throughout this litigation, the Tolands have consistently argued that they opted out of the Louisiana class action. They also moved this Court for permission to apply to Judge Livaudais regarding that class action. That motion was denied.

The terms of the New York settlement excluded the members of the Louisiana class. Presumably because the Tolands did not opt out of the second Louisiana class settlement, they were recorded as members of the Louisiana class, and no notice of the New York class action settlement was sent to them. Class counsel verified that the Tolands' names were not provided to the administrators, and the notice administrators confirmed that they sent no notice to the Tolands. The Tolands claim that their first notice of the New York class action was PSI's motion before the arbitral panel on November 30, 1995 – one month after the opt out deadline – to stay the arbitration based on the final order of the district court. The panel stayed the arbitration, and the Tolands moved for a late opt out.

In mid-October 1995, at the arbitration, PSI's lawyer asked whether the Tolands had received notice of the New York class action. According to his affidavit, PSI's lawyer proceeded to tell the Tolands' lawyer about the Tolands' membership in the class and about the opt out deadline.

At the January 18 district court hearing in New York, the Tolands' attorney could not recall the particulars of that conversation, but did remember that PSI's arbitration lawyer provided the telephone number of an in-house PSI lawyer. He went on to say that he did not follow up on the conversation, but rather operated on the assumption that the Tolands would have received notice if they were class members.

The district court's denial of the Tolands' motion was not an abuse of discretion. The fact that they were

omitted from the mailing list is not determinative, because publication notice was afforded and in any event, their attorney received personal notice two weeks before the opt out deadline.[2] Judge Pollack need not have found that the failure of their attorney to respond to inquiry notice constituted excusable neglect, and he did not abuse his discretion by refusing to do so. *See Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir.1986). PSI's agreement with the Tolands to arbitrate their dispute to its conclusion does not alter this result; the Settlement Agreement provided and the notice clearly and frequently indicated that the release was extremely broad and applied to all currently-pending claims against PSI regarding the partnerships, without exception.

E. Carl Roba

Carl Roba was a broker with PSI who purchased partnerships from the firm during the period of his employment. After he was fired, he filed an arbitration proceeding against PSI alleging wrongful termination and interference with contract, relating to his sale of partnerships.

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[2] The Tolands might have argued that they never opted out of the Louisiana class, that they were therefore never members of the New York class, and that the New York judgment cannot bar them from going forward with their arbitration; but that argument might have resulted in the same bar being imposed by the Louisiana settlement. Instead, the Tolands have consistently maintained that they opted out of the Louisiana class action, which places them squarely into the New York class.

Roba's notice of the class action was misaddressed, but he received it anyway. Even so, he believed that the settlement would only foreclose claims for partnership losses, which he was not asserting, and would not affect his arbitration, which was concerned only with Roba's employment claims. He did not timely opt out.

Roba, along with other PSI brokers (considered individually below) contended in a joint motion that the class representation was inadequate as to their employment claims, because none of the named plaintiffs were brokers having employment claims; consequently, they argue that their claims were bargained away without compensation. At the January 18 hearing, the district court ruled that the adequacy or inadequacy of the class representatives and class counsel was an issue for the fairness hearing, and was not an issue that bears on the motion to extend the opt out date.

The denial of Roba's motion was not an abuse of discretion. The notice expressly stated that the release was very broad, including any claims "in connection with or which arise out of or relate in any way to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth or referred to in the Consolidated Complaint, or which relate in any way to the marketing, purchase, sale or holding of . . . any of the Partnerships during the Class Period," and that *anyone who had purchased partnerships* should consult an attorney. As it happens, many brokers who were pursuing employment claims did opt out, precisely to avoid the ramifications of the broad release.

F. Vincent Lazara

Vincent Lazara and Jay Jablonski (considered separately below) were PSI brokers who left to work for the Smith Barney firm. Both had purchased partnerships while PSI employees.

Partnerships sold by Lazara and Jablonski became the subject of arbitration proceedings brought by customers. In 1991 and 1992, PSI lost some of these arbitration proceedings and settled some others. At that time, PSI filed Form U-5s with the SEC reporting that Lazara and Jablonski had committed wrongdoing with respect to those customers. As a result, the brokers were fired by Smith Barney, have been unable to find other employment, and commenced arbitration proceedings against PSI regarding the information provided on the U-5s.

Lazara moved in 1991, and sent word of his change of address to PSI. Notice of the class action, however, was sent to Lazara's former address; he never received it. PSI's mailing list was compiled from three sources, one of which was PSI's direct investment group mailing list. Apparently Lazara's address was not corrected on that particular list. Lazara's first notice of the class action was November 30, 1995, when PSI demanded that the arbitration be dismissed. He did not timely opt out.

Lazara participated in the joint brokers' motion for a late opt out, which was denied on January 18.

The denial of the motion as to Lazara was a tough (as opposed to an indulgent) exercise of discretion, but we cannot say that discretion was abused. Non-receipt of mailed notice does not render the notice flawed. *See*

Weigner v. City of New York, 852 F.2d 646, 649 (2d Cir.1988). Lazara could have obtained notice from any of the published sources or the widespread media coverage of the settlement. It was not an abuse of discretion for Judge Pollack to determine that – even assuming that Lazara's neglect was excusable – the prejudice to PSI, and the prejudice to the settlement process when the opt outs are considered in the aggregate, outweighed the prejudice to Lazara. *See Grinnell*, 490 F.2d at 1186.

G. Jay Jablonski

Jablonski, like Lazara, was a PSI broker who went to work for Smith Barney. Notice of the class action was sent to an incorrect address, although PSI apparently had notice of his address change. Jablonski did not receive notice prior to the opt out deadline, and he did not timely opt out.

Previously, because of customer complaints regarding his recommendations of partnership interests, Jablonski had paid $12,500 to the State of Arizona through a consent decree. Jablonski argues that by virtue of the Arizona fine, he is not properly a member of the class, because the class definition excludes:

> (iv) any person who has been determined . . . by any court of regulatory authority . . . to have violated any law, rule, or regulation, or committed any wrongdoing, in connection with or relating to the marketing, purchase, sale, or holding of . . . the Partnerships.

At the January 18 hearing, the district court ruled that Jablonski was a class member.

The issue is whether (in the words of the exclusion) Jablonski has been "determined" to have committed any wrongdoing. In other contexts, Jablonski has taken the position that the Arizona decree, because it was entered on consent, "determined" nothing. Judge Pollack commented that Jablonski was both trying to assert wrongdoing in order to be excused from the class and to reserve the ability to argue at his arbitration against PSI that he was duped into selling the partnerships.

We conclude that the district court did not abuse its discretion by ruling that the Arizona consent decree, and the fine imposed pursuant to it, did not constitute a "determination" for the purposes of the class exception, particularly because a consent decree does not result in an adjudication against the consenting party. *See Cambridge Fund, Inc. v. Abella*, 501 F.Supp. 598, 617 (S.D.N.Y.1980) (citing *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir.1976)).

H. James Barrett

James Barrett, now deceased, was a PSI broker. His brother Thomas bought partnerships,[3] but was not a PSI employee. At the time of the settlement, the Barretts were co-plaintiffs in an arbitration against PSI. James Barrett had also brought a separate arbitration proceeding against PSI, alleging both age and handicap discrimination claims as well as claims arising out of his sale of

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[3] Thomas Barrett is listed as an appellant in this appeal, but (according to his attorney at oral argument) has chosen not to pursue his appeal.

partnerships. J.A. 739, 1050. As a result of a PSI input error, James Barrett was omitted from the settlement mailing list and did not receive notice, although Thomas did. The Barretts' attorney believed that James was not a class member, and did not timely submit an opt out form on his behalf. James Barrett's motion to opt out late was denied with the other brokers' on January 18.

The notice published in three major newspapers – and received by James Barrett's brother – indicated that the release was very broad. Despite the lack of mailed notice, the Barretts' attorney knew of the class action and settlement, and could have followed up on it. There was room for the exercise of discretion in favor of James Barrett, but we think that the denial of the motion was not an abuse of discretion. The injunction barring claims released in the settlement does not bar James Barrett's discrimination claims, which he apparently remains free to pursue, as PSI advised in a letter dated December 1, 1995.

I. Jeffrey Schiller

Jeffrey Schiller sold partnerships for PSI. Having been told by PSI that ownership of the product was a good "sales tool," Schiller bought partnerships for himself as well.

Schiller was the only PSI broker to be indicted for securities fraud in connection with the sales of partnerships. The indictment was dismissed a year later, but it cost Schiller four years of income, as well as legal fees.

After dismissal of the indictment, Schiller filed an action against PSI alleging, *inter alia*, fraud and breach of contract, arising out of his employment, indictment, and his small partnership purchases. At PSI's request, the action was stayed in favor of arbitration.

Schiller did not receive notice of the class action until after the opt out date. His attorney was also unaware of the class action, and did not represent any other clients regarding the partnerships.

On November 3, 1995, PSI's attorney in the arbitration requested an adjournment of PSI's time to answer until 1996. She did not mention the existence of the class action, the settlement, or the impending fairness hearing. In late November 1995, Schiller received a class action notice, and on November 30, 1995, Schiller's lawyer received a letter demanding the dismissal of the proceedings because of the settlement.

Upon receipt of the notice, Schiller's lawyer called the claims administrator to ascertain the effect of the settlement on Schiller's claims. Counsel was told that the "employment" claims would be unaffected by the settlement (sound advice for anyone who had been an employee but not a purchaser). Thereafter, Schiller filed no claim in the class action, but discontinued his arbitration claims regarding the partnership purchases.

At the January 18 hearing, Schiller's counsel stated that Schiller had not received notice until after the opt out period had passed. The Court found that Schiller was a class member, and denied his motion for a late opt out, noting that Schiller was "in the middle" of the events leading to the settlement.

It was not an abuse of discretion for the district court to deny Schiller's motion. The evidence is consistent with timely dispatch of Schiller's notice, even though Schiller received it late. Moreover, notice was given via publication, and the settlement received extensive publicity in the media. Judge Pollack's reference to Schiller's being "in the middle" of these events is a polite reference to, *inter alia*, the fact that Schiller was the sole broker indicted as a result of the fraudulent partnerships. The district court was free to find that Schiller knew: that a settlement had been achieved; that he (as a purchaser of the Partnerships) was a part of it; and that the release was potentially broad enough to affect employment claims arising out of the transactions that were the subject of the class action.

J. Leslie and Dorothy Bishofberger

The Bishofbergers bought $266,000 in partnerships. Early in 1995, they received a notice that the SEC had settled its proceeding with PSI and that the settlement afforded a separate avenue (leading to arbitration) for claims by dissatisfied customers. That claims mechanism, called the Expedited Dispute Arbitration Program ("EDAP"), was set up by the SEC, and is wholly independent of the claims procedure that was later established under the New York class action settlement.[4] The

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[4] In addition to the various class actions filed against PSI with regard to the partnerships, the SEC investigated PSI. PSI and the SEC entered a consent decree on October 21, 1993, under which PSI agreed to provide a limitless fund to settle claims. PSI agreed to waive all statutes-of-limitations defenses against investors who submitted claims through the EDAP.

Bishofbergers elected to pursue the EDAP procedures. They filled out the form and sent it to their former PSI broker (who by then was no longer employed by PSI) for submission to the EDAP, but the broker did not forward the form to the EDAP administrator, because he was hospitalized with a heart attack.

The Bishofbergers received timely notice of the class action settlement in late September 1995. The notice specified, however, that those who had elected the EDAP were not class members. The Bishofbergers, who thought at first that they were not class members because they were in EDAP, called their former broker, and learned then that he had been ill and could not remember what he had done with their EDAP form. The Bishofbergers thus sent a new EDAP form on October 16, 1995, but did nothing at that time regarding the class action.

Two weeks later, a PSI employee called to ask the Bishofbergers why their EDAP form was late. They explained the situation to him, and he told them to do nothing while they awaited a ruling as to their late claim. They did nothing, which also meant that they did not file the opt out form in the New York class action. On November 11, 1995, they received a rejection of their request to participate in the EDAP. With the rejection was a recommendation – from the PSI employee with whom

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Eligible investors submitted their claims to PSI, who either made an offer or rejected the claim. Dissatisfied or rejected investors could pursue their claims elsewhere or enter the EDAP. EDAP decisions were binding. Investors who were members of previously certified classes or PSI employees were not eligible.

they had spoken – that their claim be dismissed as untimely.

The Bishofbergers, preferring industry arbitration to the class action settlement, moved to be allowed to opt out late. Judge Pollack denied the motion and held that the Bishofbergers were class members and bound by the settlement.

The district court did not abuse its discretion in denying the Bishofbergers' motion. The Bishofbergers received timely notice of the class action, and could easily have opted out of the class before the deadline. That was the prudent and obvious thing to do, particularly because they knew that their EDAP form had been untimely filed and they might well be class members. Their situation was unusual, but that is all the more reason they should not have ignored the warning on the notice that they should consult an attorney with any questions.

For the reasons set forth above, the judgments of the district court are AFFIRMED.

/s/ Ellsworth A. Van Graafeiland
per DGJ
ELLSWORTH A VAN
GRAAFEILAND, U.S.C.J.

/s/ Dennis Jacobs
DENNIS JACOBS, U.S.C.J.

/s/ Cuido Calabresi per DGJ
GUIDO CALABRESI,
U.S.C.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PRUDENTIAL-BACHE ENERGY INCOME PARTNERSHIPS SECURITIES LITIGATION

MDL DOCKET NO. 888
SECTION: "E"
MAGISTRATE DIVISION 2

(Entered February 3, 1994)

JUDGMENT

Considering the record, the law and the evidence presented at the Class hearing held before this Court to determine whether the terms of the Stipulation and Agreement of Compromise, dated August 27, 1993 (the "Settlement Agreement"), and the terms and conditions of the settlement proposed in the Settlement Agreement (the "Settlement Agreement"), and all transactions referred to therein or preparatory or incident thereto are fair, reasonable and adequate for the settlement of all claims asserted by Settling Investors in:

Ivar E. Anderson, Et Al v. Prudential-Bache Energy Production, Inc., Et Al, Civil Action No. 91-3020 (E.D. La.);

Cyril Forbes v. Prudential-Bache Energy Production, Inc., Et Al, Civil Action No. 91-3021 (E.D. La.);

Carl G. Harber v. Prudential-Bache Energy Production, Inc., Et Al, Civil Action No. 91-3022 (E.D. La.);

M. Barnett Gillman v. Prudential-Bache Energy Production, Inc., Et Al, Civil Action 91-0882 (E.D. La.);

Violet Dunkle v. Prudential-Bache Energy Production, Inc., Et Al, Civil Action No. 91-1270 (E.D. La.);

Theodore N. Tehune, Et Al v. Prudential Securities, Inc., Et Al, Civil Action No. 91-1293 (E.D. La.);

Christine Hassuk, Et Al v. Prudential-Bache Energy Production, Inc., Et Al, Civil Action No. 91-1744 (E.D. La.);

William J. Palenscar, Et Al v. Prudential-Bache Securities, Et Al, Civil Action No. 93-0814 "E" (E.D. La.);

Mitchell and Karen Kopin v. Graham Royalty, Ltd., Et Al, Civil Action No. 93-1454 "E";

Robert Campi, Et Al v. Prudential Insurance Company of America, Et Al, Civil Action No. 93-2317 "E" (E.D. La.); and

William E. Smith v. Prudential-Bache Securities, Inc., Civil Action 92-0045 "E" (E.D. La.)

now pending and consolidated pursuant to 28 U.S.C. §1407 in the court under the caption *In Re Prudential-Bache Energy Income Partnership Securities Litigation* – MDL 888 (collectively, the "Consolidated Actions"), and for the oral and written reasons assigned,

IT IS ORDERED, ADJUDGED and **DECREED** that the Settlement Agreement and the Settlement and all transactions referred to therein or preparatory or incident thereto, are approved as fair, reasonable and adequate, and in the best interests of the Class, and the Settling Investors and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Settlement Agreement.

The Consolidated Actions are hereby dismissed as against all Defendants, the Partnerships (and each of them), past or present subsidiaries, agents, affiliates, successors and present officers, directors, shareholders, agents, employees, attorneys, advisors, investment advisors and bankers, accountants, independent contractors, representatives, trustees, beneficiaries, parents, associates, affiliates, subsidiaries, general and/or limited partners, heirs, executors, administrators, predecessors, successors and assigns of any of them, on the merits and with prejudice against all Settling Investors, and the successors and assigns of any of them, without costs except as provided in the Settlement Agreement.

The Settling Investors and the successors and assigns of any of them, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly, derivatively, or in any other capacity, any Settled Claim against any of the Released Parties. The Settled Claims are hereby compromised, settled, released, discharged and **DISMISSED** on the merits with **PREJUDICE**.

IT IS FURTHER ORDERED, ADJUDGED and **DECREED** that the plan of allocation submitted by Class Counsel for distribution of the net settlement proceeds to Settling Investors is fair, reasonable and adequate and in the best interests of the Class, and Class Counsel is directed to proceed with the plan of allocation in accordance with its terms and provisions.

Jurisdiction is hereby reserved over Settling Investors and all parties in the Consolidated Actions and their counsel in connection with all matters relating to the

administration and effectuation of this Settlement Agreement. A hearing will be scheduled, absent consent and agreement by and between all counsel, to address attorneys' fees, costs and expenses.

New Orleans, Louisiana, February 2, 1994.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	:	MDL Docket No. 1005 M-21-67(MP)

AFFIDAVIT OF G. PETER BUCHBAND CONCERNING MAILING AND PUBLICATION OF NOTICE TO THE CLASS

STATE OF NEW YORK)
) ss
COUNTY OF NASSAU)

G. PETER BUCHBAND, being duly sworn, deposes and says:

1. I am President of The Garden City Group, Inc. ("GCG"), which was engaged to serve as Claims Administrator in the administration of the settlement in the above captioned litigation ("the Litigation").

2. During the period from August 24, 1995, through September 7, 1995. GCG received seven magnetic tapes from Prudential Securities, Inc. ("PSI"). We understand that four of these had been produced by PSI, and three by other entities acting on PSI's behalf, including Service Data Corp. We were advised that these tapes contained names, addresses and transactional information for purchases, transfers and assignments of the limited partnerships that are the subject of the Litigation (the "Partnerships"), during the period January 1, 1980, through June 8, 1994, (the "Class Period"). In addition, we received an eighth tape (the "Polaris tape") from Phoenix Leasing, Inc., which contained data obtained

from the general partner of the Polaris partnerships. The eight tapes that we received comprised 50 files in 4 different formats and a total of 442,144 records, each representing a single transaction in one of the Partnerships.

3. We were advised by PSI that the data provided to us had been filtered to exclude all purchasers of the Partnerships who were deemed to be ineligible to participate in the Settlement, *i.e.*, who had released PSI either by reason of membership in classes with which PSI had settled, or by having executed individual releases in the SEC proceeding or in various arbitrations or litigations.

4. We were also advised that the tapes included both original offering purchases and aftermarket purchases: however, we found upon examination that the aftermarket purchases could not be distinguished from transfers and assignments in the data provided to us.

5. We were additionally advised by PSI that one of the tapes contained a list of accounts involved in expedited arbitration. We were assured that these accounts had already been purged from the other data we received and that it was sent for informational purposes only.

6. We were further advised by PSI that three tapes, relating to Gold Company of America, Summit Tax Exempt Bond Fund LP, PruRealty Income, PruRealty Capital contained transcribed K-1 information. These tapes did not include any transactional data.

7. One of the eight tapes contained name and address changes, regarding potential claimants from earlier tapes.

8. The Polaris tape contained all information related to Polaris partnerships, including purchases effected through PSI as well as purchases effected through other broker-dealers. We matched the Polaris tape against the PSI tapes so as to not mail duplicate claim packages to those potential claimants who purchased Polaris partnerships from PSI.

9. We loaded data from seven of these eight tapes (not including the expedited arbitration tape) into the GCG computer system. We then created a consolidated tape from which Rosen, Mandell & Immerman ("RMI"), our printing contractor could imprint Proof of Claim forms for mailing. The Proof of Claim forms prepared in this fashion were preprinted with the Class member's name, address, tax identification number (where available), PSI account number (where available), as well as the purchase transaction information. The purpose of preprinting the transactional information was to allow a claimant to merely review the transaction data and indicate that it was correct, or to provide corrected information, as appropriate. This technique was intended to make it easier for Class members to file their claims and to facilitate the processing of Proof of Claim forms returned to us by claimants. A copy of the Proof of Claim form is attached hereto as Exhibit A.

10. The consolidated tape sent RMI included 258,458 Proof of Claim records, from which RMI produced a like number of Proof of Claim forms. In addition, we created a second consolidated tape from which we imprinted an additional 1,634 Proof of Claim forms which required more than one page to list the Class member's

purchases of partnership units. In the aggregate 260,092 Proof of Claim forms were created by this process.

11. During the period from October 4, 1995, through October 10, 1995, we received two more tapes from PSI. One of these was an additional name and address change tape containing 1,099 records. We processed these changes, and created a tape from which RMI produced a like number of Proof of Claim forms.

12. We were advised that the other of these two tapes was an update of a previous assignment tape sent to us, this time including additional date information necessary for the correct representation of aftermarket purchases on Proof of Claim forms and the correct calculation of losses resulting from aftermarket purchases. Because this tape was received after the Proof of Claim forms had been imprinted and mailed, it will be used later in the process to generate follow-up letters to those claimants whose aftermarket transactions may have been incorrectly represented on the Proof of Claim forms.

13. GCG also produced 904 cheshire style mailing labels containing the names and addresses of the largest brokerage firms, banks, institutions and other nominees from the GCG broker database in the GCG computer system. GCG prepared a Notice to Persons or Entities Holding Record Ownership on Behalf of Others (the "Brokers' Notice") requesting them to appropriately notify or identify potential Class members. A copy of the Brokers' Notice is attached hereto as Exhibit B.

14. The consolidated tape described in ¶¶ 7 and 8, above, was sent to RMI, which created the imprinted Proof of Claim forms during the period from September

12, 1995, through September 15, 1995. RMI then inserted these into envelopes containing the Notice of Pendency of Class Action. Proposed Partial Settlement of Class Action, Settlement Fairness Hearing, Right to Appear and Right to Request Exclusion from Partial Settlement of Class Action (the "Notice") and Schedules 1 and 2 to the Notice, copies of which are annexed hereto as Exhibit C. The Proof of Claim. Notice and Schedules 1 and 2 constitute the Claim Packets, which RMI mailed to potential Class members by first class mail. This mailing was completed on September 19, 1995, as shown by the affidavit of Jan Lipert concerning mailing and publication of Notice, attached hereto as Exhibit D.

15. On September 18, 1995, GCG sent to RMI the cheshire labels referred to in ¶ 13, above, to be affixed to envelopes containing the Notice. Schedules 1 and 2 to the Notice, and the Brokers' Notice.

16. On or about September 18, 1995, GCG imprinted the 1,634 Proof of Claim forms described in ¶ 10, above, inserted them into Claim Packets and mailed them via first class mail.

17. GCG has received a total of 10,926 names and addresses of potential Class members through October 30, 1995, as responses to the Brokers' Notice or as requests for Claim Packets from individuals or entities. Of these, 4,677 were determined to be additional requests for Claim Packets that had been sent in the initial mailing described in ¶ 10, above. GCG caused the 10,926 names and addresses to be transferred onto magnetic tapes and duplicates were eliminated. These tapes were sent to RMI who imprinted the name and address information onto

Proof of Claim forms, inserted the Proof of Claim forms into Claim Packets which were mailed via first class mail.

18. In addition, other nominees requested bulk quantities of Claims Packets for distribution to their customers who they identified as potential Class members. A total of 2,145 Claim Packets were sent by express or messenger service to nominees in satisfaction of these requests.

19. In the aggregate, 274,067 Claim Packets were disseminated to potential Class members through the initial mailing, nominee, bulk and individual requests.

20. At GCG's direction, RMI caused the Summary Notice of Pendency of Class Actions and Proposed Partial Settlement to be published in the national editions of *The Wall Street Journal, The New York Times* and *USA Today* on September 22, 1995, and again on September 27, 1995. Copies of the Summary Notice as published are attached hereto as Exhibit D. together with affidavits of publication from these newspapers.

/s/ G. Peter Buchband
G. PETER BUCHBAND

Sworn to before me this
3rd day of November, 1995

/s/ Anne M. Fiore
NOTARY PUBLIC

ANNE M. FIORE
NOTARY PUBLIC, State of New York
No. 4988164
Qualified in Nassau County
Commission Expires November 4, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) ORDER NO. 38 THIS DOCUMENT PERTAINS TO THE ACTIONS LISTED IN FOOTNOTE 1 BELOW

(Filed Nov. 20, 1995)

ORDER AND FINAL JUDGMENT

On the 17th day of November, 1995, a hearing was held before this Court to determine: (1) whether this Action[1] should be finally certified, solely for the purposes of the PSI Settlement and as against the PSI Settling Defendants only, as a class action pursuant to Rule 23 (a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Class as defined in this Court's Preliminary Approval Order dated August 29, 1995 (the "Preliminary

---

[1] This Order and Final Judgment shall be entered in each of the following cases: *Bottner v. A.G. Spanos Residential Partners – 86, et al.*, 93 Civ. 7708 (S.D.N.Y.); *Kahn v. Prudential-Bache Properties, Inc., et al.*, 93 Civ. 5976 (S.D.N.Y.); *Dumbroff, et al. v. Avron B. Fogelman, et al.*, 93 Civ. 6261 (S.D.N.Y.); *Gorman v. Almahurst, Inc., et al.*, 93 Civ. 8805 (S.D.N.Y.); *Kinnes, et al. v. Prudential Securities Group, Inc., et al.*, 93 Civ. 654 (D. Ariz.); *Massad, et al. v. Prudential Insurance Co., et al.*, 93 Civ. 5095 (D.N.J.). References to this "Action" herein shall be deemed to include each of the aforementioned cases.

Approval Order"); and (2) whether the terms and conditions of the Stipulation and Agreement of Partial Compromise and Settlement, dated August 9, 1995 (the "PSI Settlement Agreement") are fair, reasonable and adequate for the settlement of all claims asserted by the Class against the PSI Settling Defendants in the Consolidated Complaint now pending in this Court under the caption *In re: Prudential Securities Incorporated Limited Partnerships Litigation*, MDL 1005 including the release of the PSI Settling Defendants and the Released Parties and should be approved and an order entered barring any Non-Settling Defendant from asserting any claim against the PSI Settling Defendants by way of contribution or for PSI Acts Indemnification; and all capitalized terms used herein having the meanings as set forth and defined in the PSI Settlement Agreement; and the Court having received certain objections to the PSI Settlement Agreement, all of which were withdrawn prior [sic] the said hearing and no one having objected in any respect to the PSI Settlement Agreement at the said hearing; and no one having standing having objected at the said hearing to the approval of the said PSI Settlement Agreement; and all parties desiring to be heard having approved of the PSI Settlement Agreement and it appearing that this Action should be finally certified as a class action against the PSI Settling Defendants as stated hereafter; and the Court having filed its Decision, consisting of Findings of Fact and Conclusions of Law; and due deliberation having been had; it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. This Action satisfies the applicable prerequisites for class action treatment under F.R.Civ.P. 23(a) and

(b). The Class as defined in the PSI Settlement Agreement is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the Class, the claims of the Class representatives are typical of the claims of the Class, and the Class representatives will fairly and adequately protect the interests of the Class. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. This Action is hereby finally certified as a class action against the PSI Settling Defendants only on behalf of a class consisting of: all persons or entities, acting in their own capacity or in a representative capacity, and who either:

> (a) purchased Units in any of the partnerships or other entities listed on Schedule 1 hereto between January 1, 1980 and June 8, 1994 (the "Settlement Class Period"), on their initial offerings or in the secondary market, or
>
> (b) purchased from or through PSI on their initial offerings or in the secondary market, Units in any of the partnerships or other entities listed on Schedule 2 hereto during the Settlement Class Period.

Excluded from the Class are:

> (a) All persons or entities (i) whose claims against any of the PSI Settling Defendants with respect to the Partnerships invested in by that person or entity have been finally adjudicated,

individually or on a class-wide basis, in litigation or arbitration, before any court or arbitration tribunal; or (ii) who have entered into valid releases releasing PSI with respect to the claims asserted in the Consolidated Complaint. To the extent that any person or entity has not had all of his, her or its claims with respect to investments in all of the Partnerships finally adjudicated or finally released as against any of the PSI Settling Defendants, the Class includes said person or entity, but only to the extent of such unadjudicated and/or unreleased claims;

(b) the defendants, members of the immediate family (*i.e.* spouses and children) of any individual defendant, and the legal representatives, heirs, successors or assigns of any defendant, and the past or present subsidiaries, parents, affiliates, successors and predecessors of any of the defendants that are corporations, partnerships or other legal entities;

(c) the Partnerships and all persons or entities that are or were general partners of any of the Partnerships; and

(d) any person or entity who has been determined in any civil or criminal or administrative proceeding, by any court, or regulatory authority, including governmental, quasi-governmental or self-regulatory organization, to have violated any law, rule or regulation, or committed any wrongdoing, in connection with or relating to the marketing, purchase, sale or holding of Units or other interests in, or related to the operation, oversight, monitoring or management of any of the Partnerships.

(e) all the persons or entities listed on Exhibit A annexed hereto, each of which have filed valid requests for exclusion from the Class.

3. The PSI Settlement Agreement is approved as fair, reasonable and adequate, and in the best interests of the Class, and the Class Members and the Parties are directed to consummate the PSI Settlement Agreement in accordance with its terms and provisions. The payment of the Cash Settlement Amount is found to be fair value given in exchange for the releases of the Settled Claims against the Released Parties and fair value will have been given and received for the exchange of the reciprocal releases contemplated by Paragraph 38 of the PSI Settlement Agreement.

4. The Consolidated Complaint is hereby dismissed as against (1) any and all of the PSI Settling Defendants, (2) past or present subsidiaries, parents, successors and predecessors of any of the PSI Settling Defendants and, (3) without limitation, past or present officers, directors, shareholders, agents, employees, attorneys, advisors, investment advisors and bankers, accountants, independent contractors, representatives, trustees, beneficiaries, parents, affiliates, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns of any of the foregoing, on the merits and with prejudice against all Class Members, and the successors and assigns of any of them, without costs except as provided in the PSI Settlement Agreement.

5. The Consolidated Complaint and the Action are *not* hereby dismissed, and shall continue herein, as against any entity or individual named as a defendant in the Consolidated Complaint who is not expressly named

or described in the PSI Settlement Agreement as a PSI Settling Defendant. All claims against any Non-Settling Defendants by the Released Parties, the Plaintiffs and the Class Members are hereby preserved.

6. The Settled Claims are hereby compromised, settled, released, discharged and dismissed on the merits and with prejudice by virtue of the proceedings herein and this Order and Final Judgment. Members of the Class and the successors and assigns of any of them, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any Settled Claims against any of the Released Parties.

7. Each of the Non-Settling Defendants who may assert a claim against any of the Released Parties based upon, relating to, or arising out of the Settled Claims, is hereby permanently barred, enjoined and restrained from commencing, prosecuting, or asserting any claim or claims with respect to such matters for contribution or PSI Acts Indemnity, against the Released Parties as claims, cross-claims, counterclaims, or third party claims, in this Action or in any other court, arbitration proceeding, administrative agency or forum, or in any other manner, including but not limited to offset. All such claims are hereby extinguished, discharged, satisfied, barred and rendered unenforceable. This Court shall have exclusive jurisdiction over any such claims that may be asserted.

8. The Class Representatives, the Class, and the Class Members shall reduce any judgment with respect to the Settled Claims which they obtain against any other

person or entity, by the amount, percentage or share of such judgment determined by final non-appealable order to be attributable to the conduct of the Released Parties so as to discharge and release under applicable law any judgment for contribution or for PSI Acts Indemnification against the Released Parties arising from or related to such claims. This Court shall have exclusive jurisdiction over any dispute with respect to any such matter.

9. Neither the PSI Settlement Agreement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

A. Construed as or deemed in any judicial, administrative, arbitration or other type of proceedings, to be evidence of a presumption, concession, or an admission by any of the Released Parties of the truth of any fact alleged or the validity of any claim that has been, could have been or in the future might be asserted in the Consolidated Complaint, or otherwise against the Released Parties, or of any purported liability, fault, wrongdoing or otherwise of the Released Parties; or

B. Offered or received in evidence in any judicial, administrative, arbitration or other type of proceeding for any purpose whatsoever, including, but not limited to, as a presumption, concession or an admission of any purported liability, wrongdoing, fault, misrepresentation or omission in any statement, document, report, or financial statement heretofore or hereafter issued, filed, approved or made by any of the Released Parties or otherwise referred to for any other reason, other than for the purpose of and

in such proceeding as may be necessary for construing, terminating or enforcing the PSI Settlement Agreement; or

C. Construed as a concession or an admission that the Class Representatives or the Class have suffered any damage; or

D. Construed as or received in evidence as an admission, concession or presumption against the Class Representatives or the Class or any of them that any of their claims are without merit or that damages recoverable under the Consolidated Complaint would not have exceeded the Settlement Pool.

10. Exclusive jurisdiction is hereby retained over the Parties, the Class Members and the Non-Settling Defendants for all matters relating to this litigation, including the administration, interpretation, effectuation or enforcement of the PSI Settlement Agreement, approval of the amended Plan of Allocation, the award of attorneys' fees and expenses and the effectuation or enforcement of this Order and Final Judgment.

11. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the PSI Settlement Agreement.

12. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: New York, New York
November 20, 1995

/s/ Milton Pollack
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) (Filed Jan. 23, 1996)

ORDER

John D. Toland, personally and on behalf of his wife (now deceased) and the John Toland Company (the "Tolands"), having moved this Court, pursuant to Rules 6(b), 23(a)(4), (c)(2), (e), 60(b)(1), (3), (4) and (6) of the Federal Rules of Civil Procedure, as well as contractual and equitable principles, for an Order: (1) declaring this Court's November 20, 1995 Order and Final Judgment void and/or vacated as to them; (2) declaring Prudential Securities incorporated, Prudential-Bache Energy Production, Inc. and Prudential Securities Group, Inc. (the "Respondents") contractually bound to arbitrate the claims asserted against them by the Tolands in their arbitration proceeding pending before the American Arbitration Association, AAA Case No. 71 136 00185 93, and to pay any award and otherwise provide any relief deemed proper by the arbitration panel therein; (3) declaring the Respondents estopped from attempting to hold the Tolands bound by this Court's Order and Final Judgment; (4) extending the period of time for the Tolands to opt out of this class action; or (5) directing that re-notification be reissued to the Tolands; and (6) for attorneys' fees and costs involved in seeking the

requested relief, and for such other and further relief as this Court shall deem just and proper; it is hereby

ORDERED that the Tolands' motion is denied in its entirety and that the Tolands shall forthwith dismiss with prejudice their arbitration pending before the American Arbitration Association as AAA Case No. 71 136 00185 93; and it is further

ORDERED that all action taken herein is without prejudice to the Tolands' rights, if any, to participate in the class settlement in *In re Prudential-Bache Energy Income Partnerships Securities Litigation*, MDL 0888 (E.D. La.).

Dated: New York, New York
January 23, 1996

/s/ Milton Pollack
MILTON POLLACK
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	x	**MDL Docket**
In re: PRUDENTIAL	x	**No. 1005**
SECURITIES	x	**M-21-67 (MP)**
INCORPORATED LIMITED	x	
PARTNERSHIPS LITIGATION	x	**(Filed Feb. 5, 1996)**
	x	

Amended Notice of Appeal

MacDaniel and Miriam Jackson (the "Jacksons") hereby give this Amended Notice of Appeal of this action against Prudential Securities Incorporated ("PSI") and all other Plaintiffs and Defendants in this action.

The Jacksons appeal from this Court's Order No. 44 pertaining to the Jacksons' Motion, which Order is dated January 19, 1996. The Jacksons further appeal from the Court's Order dated November 20, 1995 entitled Order and Final Judgment.

The case will be appealed to the United States Court of Appeals for the Second Circuit.

Of all of the foregoing all parties will kindly take Notice.

Respectfully Submitted,

Ferguson & Company, P.C.

By: /s/ Jerome H. Ferguson
Jerome H. Ferguson, III
State Bar No. 06925400

300 Embassy Court
624 N. Good-Latimer
Dallas, Texas 75204
214/824-5555
214/823-3888 – fax

Certificate of Service

This is to certify that the undersigned has caused a copy of the foregoing instrument to be served upon the following counsel in this proceeding, by forwarding a copy of same to be deposited in the United States Mail, postage prepaid, to the following addresses, as stated below on this the 1 day of February, 1996.

/s/ Jerome H. Ferguson
Jerome H. Ferguson, III

Matthias Mone
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005

Donald R. Littlefield
Prudential Securities, Inc.
Suite 1550
10440 N. Central Expressway
Dallas, Texas 75231

Melvyn I. Weiss
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, New York 10019

Lawrence A. Sucharow
Joel H. Bernstein
Goodkind Labaton Rudoff & Sucharow LLP
100 Park Avenue
New York, New York 10017

Nicholas E. Chimicles
Chimicles Jacobsen & Tikellis
One Haverford Center
361 West Lancaster Avenue
Haverford, Pennsylvania 19041-0100

H. Sullivan Bunch
Bonnett Fairbourn Friedman & Balint, PC
4041 N. Central Avenue, Suite 1100
Phoenix, Arizona 85012-3311

Clinton Krislov
Krislov & Associates
222 N. LaSalle Street, Suite 810
Chicago, Illinois 60601

William F. Duker
Duker & Barrett
1585 Broadway, 19th Floor
New York, New York 10036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	**MDL Docket No. 1005** **M-21-67 (MP)** **Re: Opt Out Order No. 44-D** **(Filed Feb. 22, 1996)**

Notice of Appeal

MacDaniel and Miram Jackson (the "Jacksons") hereby give this Notice of Appeal of this action against Prudential Securities Incorporated ("PSI") and all other Plaintiffs and Defendants in this action.

The Jacksons appeal from this Court's Order Amending Order No. 44 pertaining to the Jackson's Motion, which Order is dated January 19, 1996. The Jacksons further appeal from the Court's Order dated November 20, 1995 entitled Order and Final Judgment. The Jacksons further appeal from Order Amending Order No. 44 dated February 8, 1996.

The case will be appealed to the United States Court of Appeals for the Second Circuit.

Of all of the foregoing all parties will kindly take Notice.

Respectfully Submitted,

Ferguson & Company, P.C.

By: /s/ Jerome H. Ferguson
Jerome H. Ferguson, III
State Bar No. 06925400

300 Embassy Court
624 N. Good-Latimer
Dallas, Texas 75204
214/824-5555
214/823-3888 – fax

Certificate of Service

This is to certify that the undersigned has caused a copy of the foregoing instrument to be served upon the following counsel in this proceeding, by forwarding a copy of same to be deposited in the United States Mail, postage prepaid, to the following addresses, as stated below on this the 16 day of February, 1996.

/s/ Jerome H. Ferguson
Jerome H. Ferguson, III

Matthias Mone
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005

Donald R. Littlefield
Prudential Securities, Inc.
Suite 1550
10440 N. Central Expressway
Dallas, Texas 75231

Melvyn I. Weiss
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, New York 10019

Lawrence A. Sucharow
Joel H. Bernstein
Goodkind Labaton Rudoff & Sucharow LLP
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New York, New York 10017

Nicholas E. Chimicles
Chimicles Jacobsen & Tikellis
One Haverford Center
361 West Lancaster Avenue
Haverford, Pennsylvania 19041-0100

H. Sullivan Bunch
Bonnett Fairbourn Friedman & Balint, PC
4041 N. Central Avenue, Suite 1100
Phoenix, Arizona 85012-3311

Clinton Krislov
Krislov & Associates
222 N. LaSalle Street, Suite 810
Chicago, Illinois 60601

William F. Duker
Duker & Barrett
1585 Broadway, 19th Floor
New York, New York 10036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Filed May 28, 1996)

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

JOHN D. TOLAND and CHRISTAL TOLAND, as husband and wife and d/b/a the John Toland Company, Plaintiffs-Appellants,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION, Defendant-Appellee

Use short title

95-9209(L)
Docket Number

NOTICE OF MOTION

state type of motion

for Modification of Stay and Injunction

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Paula Frome (PSF-8543)
DEUTSCH & LIPNER
1325 Franklin Avenue
Garden City, New York 11530
(516) 294-8899

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and of attorney in charge of case)*

See attached

Has consent of opposing counsel:
A. been sought? Class counsel [ ] Yes [ ] No
B. been obtained? does not [ ] Yes [ ] No
Has service been effected? oppose. [x] Yes [ ] No
Is oral argument desired? [x] Yes [ ] No
(Substantive motions only)
Requested return date: 06-11-96
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? [ ] Yes [x] No
B. by firm date of argument notice? [ ] Yes [x] No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [x] Yes [ ] No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? [ ] Yes [x] No

If No, explain why not:

The motion is for permission to petition another court, which exped. would not affect Movant will so agree.

Will the parties agree to maintain the status quo until the motion is heard? [x] Yes [ ] No

Judge or agency whose order is being appealed:

Milton Pollack, United States District Court for the Southern Dist. of N.Y.

Brief statement of the relief requested:

Permission to petition United States District Court for the Eastern District of Louisiana for a ruling on whether the Tolands are bound by a Judgment in a class action which preceded the class action below.

Complete Page 2 of this Form

Appellant or Petitioner:
[x] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

By: *(Signature of attorney)*

Paula Frome
Signed name must be printed beneath

/s/ Paula Frome

Appearing for:
(Name of party)

John D. Toland, et al.

Date

5/23/96

ORDER

Before: OAKES, ALTIMARI and WALKER, CJJ.

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED.

George Lange III, Clerk
By: /s/ Arthur Heller
Arthur Heller,
Administrative Attorney

Date: June 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Filed Apr. 15, 1996)

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

Re: Prudential Securities Incorporated Limited Partnerships Litigation MacDaniel Jackson and Miriam Jackson Plaintiffs-Appellants *Use short title*	96-7147 *Docket Number* **NOTICE OF MOTION** *state type of motion* for Dismissal of Appeal

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Thomas J. Kavaler
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
212-701-3000

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and of attorney in charge of case)*

Jerome H. Ferguson, III
Ferguson & Company, P.C.
300 Embassy Court
624 N. Good-Latimer
Dallas, Texas 75204
214-824-5555

Has consent of opposing counsel:
A. been sought? [x] Yes [ ] No
B. been obtained? [ ] Yes [x] No
Has service been effected? [x] Yes [ ] No
Is oral argument desired? [x] Yes [ ] No
(Substantive motions only)
Requested return date: April 30, 1996
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? [ ] Yes [x] No
B. by firm date of argument notice? [ ] Yes [x] No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [x] No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? [ ] Yes [x] No

If No, explain why not:

This appeal is being consolidated with several other appeals.

Will the parties agree to maintain the status quo until the motion is heard? [x] Yes [ ] No

Judge or agency whose order is being appealed:

Senior Judge Milton Pollack

Brief statement of the relief requested:

Dismissal of Appeal

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Thomas J. Kavaler
Signed name must be printed beneath

Thomas J. Kavaler

Appearing for:
(Name of party)

Prudential Securities Incorporated

Date

4/12/96

Appellant or Petitioner:
[ ] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [x] Defendant

ORDER

BEFORE: VAN GRAAFEILAND, JACOBS and CALABRESI, CJJ.

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

FOR THE COURT,
GEORGE LANGE III, Clerk
By: /s/ Arthur Heller
Arthur Heller,
Administrative Attorney

December 3, 1996

Previous requests for similar relief and disposition:

None

Statement of the issue(s) presented by this motion:

Whether plaintiff-appellant has timely filed a Notice of Appeal.

Brief statement of the facts *(with page references to the moving papers)*

The Order appealed from was filed on November 20, 1995 (Aff. ¶ 8). The Notice of Appeal was filed on January 26, 1996 (Aff. ¶ 8).

Summary of the argument *(with page references to the moving papers)*

FRAP Rule 4(a) requires that a Notice of Appeal be filed with the District Court within 30 days from entry of the order or judgment appealed from.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of one thousand nine hundred and

Present:

Hon. Ellsworth A. Van Graafeiland

Hon. Dennis G. Jacobs

Hon. Guido Calabresi

CIRCUIT JUDGES

In Re: Prudential Se

95-9209

(Filed Jan. 27, 1997)

A petition for rehearing having been filed herein by Appellants MacDaniel Jackson and Miriam Jackson

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
GEORGE LANGE III, Clerk
By: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

pethrg_frm
p/o/AA

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	:	MDL Docket No. 1005 M-21-67 (MP)
In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	:	

AFFIDAVIT OF MAHLON M. FRANKHAUSER

1. I am a partner in the law firm of Kirkpatrick & Lockhart LLP and counsel for Respondents in an arbitration pending before the American Arbitration Association ("AAA") entitled *John and Christal Toland and John and Christal Toland d/b/a the John Toland Company v. Prudential-Bache Energy Production, Inc., Prudential Securities Group, Inc., and Prudential Securities Incorporated* (AAA Case No. 71 136 00185 93).

2. To date, nine days of testimony have been heard by a panel of arbitrators sitting in Dallas, Texas. The first five days of hearing sessions occurred on July 17-21, 1995, and the second set of hearing sessions occurred on October 17-20, 1995.

3. The Claimants have not rested their case, and the Respondents will present at least one rebuttal witness. On the final day of the October hearing sessions, an additional two days of hearing were scheduled for December 18-19, 1995.

4. In early September of 1995, I became aware – via the press – of this Court's Preliminary Approval Order

granting preliminary approval to the proposed settlement of a class action involving the sale by Prudential Securities Incorporated ("PSI") of limited partnership interests to investors.

5. In early October 1995, I was informed that a Notice relating to the above-referenced class action had been sent to class members and the deadline to opt-out of the class action was October 30, 1995.

6. On October 17, 1995, prior to the beginning of the second set of hearing sessions, I asked Mr. Duncan, Claimants' counsel, if Claimants had informed him of their receipt of the Notice relating to the class action encompassing their claims in the arbitration proceeding. I advised Mr. Duncan that the opt-out date was October 30, 1995. Mr. Duncan indicated he was unsure whether his clients had received Notice, but asserted that it did not apply to them since Respondents agreed to arbitrate the matter before the AAA.

7. I advised Mr. Duncan that I was not class action counsel, and suggested that he discuss the matter with Mr. Gabriel Loubier, a PSI Assistant General counsel familiar with the class action and Notice sent to class members. Mr. Duncan was given Mr. Loubier's direct telephone number in PSI's Law Department.

8. I further advised Mr. Duncan that I was not the person to discuss his views concerning the agreement to arbitrate and how that related to the settlement of the class action.

9. The arbitration hearing sessions thereafter proceeded for the next four days. Because Claimants did not

finish the presentation of their case, additional days of testimony were scheduled for December 18 and 19, 1995. Respondents also intended to present at least one rebuttal witness.

10. On November 30, 1995, I was informed that the class action's Claims Administrator had not received an opt-out notice from Claimants. I immediately filed a motion to stay the arbitration proceeding until Mr. Duncan could resolve the matter before this Court.

11. Thereafter, Mr. Duncan, on behalf of Claimants, filed a response alleging, among other things, Claimants had not received the Notice, and the United District Court for the Southern District of New York did not have jurisdiction over Claimants and that Claimants were not members of the class certified in the class action.

12. On December 14, 1995, the AAA arbitration panel stayed the arbitration proceeding until further notice.

FURTHER AFFIANT SAYETH NOT.

/s/ Mahlon M. Frankhauser
Mahlon M. Frankhauser

District of Columbia) ss.

Subscribed and sworn to
before me this 5th day
of January, 1996.

/s/ Judith E. Snyder
Notary Public

My Commission Expires:
Illegible

MILBERG WEISS BERSHAD HYNES & LERACH LLP

ONE PENNSYLVANIA PLAZA
NEW YORK, NEW YORK 10119-0165
(212) 594-5300
FAX: (212) 868-1229

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(619) 231-1058
FAX: (619) 231-7423

DIRECT LINE:
(212) 946-9310

(Balance Of Letterhead Omitted In Printing)

February 6, 1997

Via Fax

Neil Chamberlin, Esq.
Duncan & Rainwater
Three Financial Centre
Suite 500
900 S. Shackleford
Little Rock, AR 72211-3850

Re: *In Re Prudential Securities, Inc. Limited Partnerships Litigation, MDL 1005*

Dear Mr. Chamberlin:

In response to your letter of January 23, 1997 I have reviewed a copy of the Tolands' claim fine from the Garden City Group, Inc., Claims Administrator for the Prudential Securities Inc. Limited Partnerships Settlement, as well as the December 27, 1996 Opinion of the Second Circuit Court of Appeals.

As I understand it, the Garden City Group's notice indicated that the Toland's Claim would be rejected based on all of their purchases having been covered by a prior class action, not because of the unfinished arbitration, as stated in your letter. The Garden City Group's letter was based on a notice from PSI representing that the Tolands were members of the prior *Prudential Bache Energy Income Class Action* (the "Louisiana class action").

While it is not clearly determined, footnote 2 of the Second Circuit's opinion states in part "the Tolands have consistently maintained that they opted out of the Louisiana class action, which places them squarely into the New York class."

It seems to me that there are two possible outcomes we can agree upon: either the Tolands agree that they are members of the Louisiana class action and accept the money that I understand is available there, and not participate in this class; or we can both agree that the Tolands are "squarely in this class" Mr. Toland can sign a non-provisional Proof of Claim, giving the full release required in the above action, and the Tolands can share in the settlement proceeds here (and not take the money from the Louisiana class action).

It appears that if the Toland's agree that they are "squarely in this action" they would have a Weighted Recognized Loss of $117,796.74 under the formula in this action. The most recent estimate is that class members will receive approximately 35% of their Weighted Recognized Loss from this action. I understand that you are in touch with counsel in the Louisiana class action with respect to what, if anything, might be available there.

If the Tolands' decision is to agree that they are squarely in this class action, please submit a clean, executed Proof of Claim in substitution for their provisional claim and plaintiffs' counsel will recommend its acceptance.

Please also note that, as you requested, I have contacted the Garden City Group and arranged an extension until February 27, 1997 for any response the Tolands wish to make to the Garden City Group's letter of January 21, 1997.

Very truly yours,

/s/ George A. Bauer III
George A. Bauer III

cc: Ms. Shandarese Garr
The Garden City Group, Inc.

RE: PRUDENTIAL-BACHE ENERGY INCOME PARTNERSHIP SECURITIES LITIGATION

DEAR CLAIMANT:

ENCLOSED PLEASE FIND A CHECK REPRESENTING YOUR PRO RATA SHARE OF THE DISTRIBUTION OF THE PROCEEDS FROM THE NET SETTLEMENT FUND RELATING TO THE SETTLEMENT IN THE ABOVE-CAPTIONED ACTION. YOUR ALLOWABLE SHARE WAS CALCULATED BASED ON THE FORMULA SET FORTH IN THE ORIGINAL CLASS NOTICE. BY WAY OF EXAMPLE, THE FORMULA WAS APPLIED AS FOLLOWS (THE NUMBERS USED ARE PURELY FOR ILLUSTRATION AND DO NOT RELATE SPECIFICALLY TO YOUR CLAIM):

ORIGINAL PURCHASE PRICE OF UNITS	$10000		
DISTRIBUTIONS RECEIVED ON UNITS (IF ANY)	-$ 4000		
TOTAL DIFFERENCE x 140%	=$ 6000 x 140%	=	$8400
AMOUNT RECEIVED IN TENDER OFFER OR SALE		-	$3300
YOUR ALLOWABLE SHARE		=	$5100

THE SUM OF ALLOWABLE SHARES FOR ALL CLAIMANTS WAS DIVIDED INTO THE NET SETTLEMENT FUND TO DETERMINE YOUR PRO RATA SHARE.

BEST AVAILABLE COPY

Please Detach And Retain For Your Records

PRUDENTIAL CHECK# 31877

Payable Date	Amount
06/26/95	$52,299.36

PAY EXACTLY *********52,299 DOLLARS AND 36 CENTS

51-44
119

JOHN TOLAND CO
LTD PARTNERSHIP
1700 ARROWHEAD RD
N LITTLE ROCK AR 72118-3873

Payable at
Shawmut Bank Connecticut, N A
Hartford, Connecticut
Disbursing Agent

Authorized Signature

Pa.
To The
Order

"00000 31877" :011900445: 50618"

App. 67

No. 96-1538

(2)

Supreme Court, U.S.
FILED
APR 28 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN D. TOLAND and CHRISTAL TOLAND,
as husband and wife and d/b/a the John Toland Company,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS J. KAVALER
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

MATHIAS E. MONE
JOHN M. MCSHERRY
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
New York, New York

31 pp

QUESTION PRESENTED

Whether the court below correctly decided that where an absent class member had actual notice of a class action settlement prior to the expiration of the opt-out period but failed to take any steps to opt out, the district court's denial of the class member's request for relief under Rules 6(b) and 60(b) was not an abuse of discretion notwithstanding the class member's failure to receive mailed notice of the settlement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1538

JOHN D. TOLAND and CHRISTAL TOLAND,
as husband and wife and d/b/a the John Toland Company,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Prudential Securities Incorporated ("PSI")[1] respectfully submits that a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit should not issue because that decision does not conflict—nor is it even said by Petitioners to conflict—with any

[1] Pursuant to Supreme Court Rule 29.6, PSI advises the Court that neither it nor its ultimate parent, The Prudential Insurance Company of America, a mutual insurance company, nor any subsidiary or affiliate has issued shares to the public.

decision of any other circuit, because no question worthy of the exercise of this Court's certiorari jurisdiction is presented and because, in any event, the decision below is in all respects correct.

COUNTER-STATEMENT OF THE CASE

The factual statement in the Petition is legally inaccurate,[2] presents matters *dehors* the Record (*e.g.*, Pet. App. at 63-65) and contains numerous misstatements and omissions with respect to both the course of proceedings before the District Court and the opinion of the Court of Appeals. Such misstatements and omissions (which themselves reflect negatively on the "cert-worthiness" of this case) necessitate this counter-statement pursuant to Supreme Court Rule 15.2.

This Petition arises out of the historic and much publicized partial settlement in a multi-districted class action styled *In re Prudential Securities Incorporated Limited Partnerships Litigation*, MDL No. 1005 ("MDL 1005"). By the Final Judgment, Senior United States District Judge Milton Pollack of the Southern District of New York certified a Class against PSI and some of its co-defendants and approved a $110 million Settlement benefitting more than seventy-five thousand investors nationwide.[3] The Settlement was entered into by PSI

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[2] For example, the Petition erroneously contends that the decisions below violated Petitioners' rights under the Due Process clause of the *Fourteenth* Amendment. (Pet. at 2, 7) As the decisions below were issued by federal courts applying federal law, however, the constitutional provision involved is the Due Process clause of the *Fifth* Amendment.

[3] Capitalized terms have the same meaning ascribed to them in the Settlement Agreement found in the Appendix filed with the Court of Appeals at A65-A73. In addition, references herein to "Pet. at ___" are to the Petition for a Writ of Certiorari. References herein to "Pet. App. ____" are to the Appendices annexed thereto. References to "A ___" are to the Appendix filed by Appellants in the Court of Appeals for the Second Circuit on their appeal below. Where necessary, documents not in Appellants' Appendix are referred to by their record number on the district court docket sheet at A1 in the form "A1 - R.___."

to ensure peace and finality with respect to years of litigation arising out of its marketing and sale of limited partnership interests during the 1980's.

Petitioners John D. and Christal Toland ("the Tolands") are Class Members who, because they neglected to exclude themselves from the Class by opting out prior to the court-imposed deadline, are now bound by the Final Judgment, which includes a provision enjoining the continued prosecution of Settled Claims against PSI and other Released Parties. The Tolands seek the issuance by this Court of a writ of certiorari to review the parochial issue of whether the Court of Appeals properly affirmed Judge Pollack's exercise of his discretion to deny the Tolands' motion, pursuant to Rules 6(b) and 60(b) of the Federal Rules of Civil Procedure, for extraordinary relief from the Final Judgment and permission belatedly to opt out of the Class in order to continue an arbitration proceeding against PSI which is barred and enjoined by the Final Judgment.

A. Background

On May 19, 1994, Judge Pollack entered an order consolidating in the Southern District of New York several class actions transferred thereto by the JPML (of which he was then a member) which asserted claims arising out of PSI's marketing, sale and operation of over 700 Partnerships.[4] (A595) On June 8, 1994, the representative plaintiffs in the consolidated actions filed a Consolidated Complaint in which they asserted RICO and common law claims premised on allegations that the Partnerships were uniformly marketed and sold as part of a massive and continuing fraudulent scheme.

---

[4] Prior to the consolidation of the various private actions filed against PSI, the Securities and Exchange Commission ("SEC") investigated PSI. PSI and the SEC entered into a consent decree in the United States District Court for the District of Columbia on October 21, 1993, under which PSI agreed to provide reparations to settle claims arising out of the same partnership failures (the "SEC Fund"). (A607)

(A598) PSI moved to dismiss the Consolidated Complaint on December 20, 1994. (A604)

B. The August 9, 1995 Settlement

After an "intensive and multifaceted investigation by plaintiffs' counsel" (A292) which included their review of millions of pages of documents produced by PSI, and after months of serious negotiations extensively and personally supervised by Judge Pollack, plaintiffs reached a Settlement with the PSI Settling Defendants (A610-11) which provided that PSI would pay $110 million into a Settlement Fund for the benefit of the Class. In return, Class Members would give a broad release and be enjoined from further litigation against PSI.

(i) The "Blow" Provision

A significant and fundamental part of the Settlement was a "blow" provision (A78-80) which recognized that while PSI was eager to make a global disposition to reach finality, PSI was unwilling to do so were it still to face the expense and burden of continuing to defend a multitude of cases around the country. Thus, the Settlement stipulated that if Class Members whose claims aggregated more than $10 million excluded themselves, PSI had the right to nullify (or "blow") the $110 million Settlement. If PSI exercised this right, the 100,000-plus Class Members would recover nothing by way of this Settlement. In effect, PSI was willing to pay a prospective $120 million: $110 million for the Settlement and potentially as much as $10 million more to cover opted-out claims.[5]

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[5] The Settlement Agreement provided that if PSI elected to "blow" the Settlement, the Court and Lead Class Counsel were to be notified no more than seven calendar days after the deadline set in the Preliminary Approval Order for the receipt of requests for exclusion—thus providing time for PSI to analyze the opt-outs. If on the day prior to the Fairness Hearing (after efforts by Lead Class Counsel to minimize the number of opt-outs), the aggregate of such claims did not exceed $10 million, then PSI's election to "blow" became null and void. (A80-81) Consequently, it was significant to PSI to know exactly what additional claims it might be facing so as not to render its bargained-for peace illusory.

(ii) Preliminary Approval of the Settlement

Describing the Settlement as an "outstanding achievement for the benefit of the Class" (A290), Judge Pollack entered the Preliminary Order on August 29, 1995 (A184) and filed an opinion in connection therewith (163 F.R.D. 200) which: preliminarily approved the proposed Settlement; preliminarily certified a proposed Class pursuant to Rule 23(b)(3); scheduled a Fairness Hearing; approved the form, content and manner of giving Notice; appointed Class representatives; and designated Lead Class Counsel. (A288)

The certified Class was defined as all persons or entities, acting in their own capacity or in a representative capacity, who "purchased Units in any of the Partnerships or other entities . . . between January 1, 1980 and June 8, 1994."[6] This Class definition excluded, *inter alia*, persons whose claims had previously been released, the Partnerships, defendants and the individual defendants' immediate families.

(iii) The Release and Injunction

The Settlement included a broad release (A77-78) by which Class Members relinquished all "Settled Claims" which were broadly defined.[7] (A71-72) To give teeth to the Release and ensure that the peace and finality for which PSI was paying $110 million would be preserved, the Settlement was conditioned on the incorporation in the Final Judgment of an injunction barring the continued prosecution of any Settled Claims. (A82)

(iv) Notice

The proposed Class Notice (A390) gave Class Members a fair understanding of the action, the parties and the nature of the Settlement. Specifically, the Class Notice contained the

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6 Petitioners are members of the Class.

7 Petitioners' claim is a Settled Claim.

following provisions under the heading "RIGHTS AND OPTIONS OF CLASS MEMBERS":

> "If you are a Class Member, you have a choice as to whether or not to remain a member of the Class . . . (a) IF YOU DO NOTHING YOU AUTOMATICALLY REMAIN A MEMBER OF THE CLASS . . . . YOU WILL NOT BE ABLE TO COMMENCE OR CONTINUE ANY OTHER LITIGATION, ARBITRATION OR OTHER CLAIM AGAINST ANY PSI SETTLING DEFENDANT IN ANY OTHER FORUM WITH RESPECT TO THE SETTLED CLAIMS . . . . (b) IF YOU WANT TO EXCLUDE YOURSELF FROM THE CLASS AND NOT BE INCLUDED AS A CLASS MEMBER, THE COURT WILL EXCLUDE YOU . . . ONLY IF YOU SUBMIT A WRITTEN REQUEST FOR EXCLUSION. TO BE EFFECTIVE THE WRITTEN REQUEST FOR EXCLUSION MUST BE SIGNED . . . AND MUST BE MAILED . . . SO AS TO BE RECEIVED NO LATER THAN OCTOBER 30, 1995 . . .
>
> * * * * *
>
> *If you . . . do not request exclusion in the manner and within the time described above*, you will automatically be included as a Class Member, and . . . *all orders or judgments issued by the Court in this litigation and any release given in connection with the Partial Settlement will be binding upon you.*" (A393) (emphasis supplied and omitted)

The Class Notice also specifically informed Class Members:

> "*If you have pending your own claim or action* against any person or entity in connection with an investment in any of the Partnerships (as defined [therein]), *you should consult with the attorney representing you*, as this Consolidated Action, the certification of the Class, the proposed Partial Settlement and *this Notice may affect your claim or your action.* . . .

THE RELEASE TO BE GIVEN TO THE PSI SETTLING DEFENDANTS AND THE RELEASED PARTIES IS VERY BROAD AND MAY IMPACT UPON OTHER RIGHTS OR CAUSES OF ACTION YOU HAVE." (A390) (emphasis added)

As ordered by Judge Pollack, the Class Notice was 1) mailed to all Class Members who could be identified with "reasonable effort" by Lead Class Counsel with the cooperation of PSI, which made relevant information available to Lead Class Counsel; and 2) published by Lead Class Counsel in the national editions of *The Wall Street Journal*, *The New York Times* and *U.S.A. Today* twice within ten days of the Class Notice mailing. Both the Class Notice and Published Notice informed Class Members, *inter alia*, of the necessity to opt out by October 30, 1995 if a Class Member desired to proceed individually with his or her claims.[8]

Prior to its mailing and publication and after first incorporating his own revisions therein, Judge Pollack determined that the form and method of notifying the Class Members of the terms and conditions of the Settlement met "the requirements of F.R. Civ. P. 23 and due process, constitute[d] the best notice practicable under the circumstances, and ... constitute[d] due and sufficient notice to all persons and entities entitled thereto." (A192)

In accordance with the Preliminary Order, PSI provided the Claims Administrator with certain addresses to which Class Notices were to be directed. (A191) Those addresses appeared in a data base maintained by PSI of all purchasers of Partnerships sold through its Direct Investment Group. This data base, which contained information on several hundred thousand PSI accounts and which had been utilized by PSI without objection in connection with the SEC Fund (*see supra* n.4), was considered to be the best practicable source for

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[8] Petitioners did not opt out by October 30, 1995.

identifying Class Members. It was not, however, totally error free—nor could it be expected to be.

As ordered by Judge Pollack, on September 18 and 19, 1995, Lead Class Counsel sent copies of the Class Notice by mail to approximately 100,000 investors.[9] (A382) In addition, the Published Notice appeared in the national editions of *The Wall Street Journal, The New York Times* and *U.S.A. Today*, on two separate occasions in each paper, and copies of the Class Notice were also mailed to persons responding to the Published Notice.[10] (A409; A594)

C. Proceedings Below

(i) The November 17, 1995 Fairness Hearing

On November 17, 1995, Judge Pollack conducted a Fairness Hearing to determine the fairness, reasonableness and adequacy of the Settlement. Petitioners did not appear at the Fairness Hearing or otherwise file a timely objection to the Settlement. (A621; A451-55)

At the Fairness Hearing, PSI explained that, even though the opt-outs exceeded the $10 million threshold, it had elected not to "blow" the Settlement, *i.e.*, having analyzed the quantity and quality of the opt-outs, PSI decided not to exercise its termination rights. (A482) PSI explained that it would be looking to the District Court to enforce those provisions of

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[9] Of approximately 350,000 potential Class Members (*i.e.*, Partnership investors) (A297), there are (after application of all relevant exclusions) approximately 100,000 Class Members. (A594) Approximately 250,000 Notices were sent because some Class Members had multiple accounts and PSI was unable to identify and remove some excluded investors from the mailing list. (*Id.*)

[10] The court-ordered mailings and publication were not the sole notice to investors—the Settlement received widespread national media coverage through press and wire service reports and a CNN television news segment. (A1046) Beyond this, entrepreneurial lawyers with access to investor lists also solicited investors to opt out. (*E.g.*, A377)

the Settlement which afforded it the finality and repose that it had bargained and paid for. (A483)

At the close of the Fairness Hearing, Judge Pollack held:

> "On the basis of a thorough understanding of this matter, and there being no pertinent objection voiced either in writing or before the Court, the Court finds that the partial settlement proposed in every aspect meets all legal requirements and is intrinsically and objectively fair, reasonable and adequate and in the best interests of the class and is in all respects approved." (A516)

(ii) The November 20, 1995 Order And Final Judgment

On November 20, 1995, the District Court entered the Final Judgment (i) finally certifying the Class against the PSI Settling Defendants; (ii) approving the Settlement; (iii) dismissing all Settled Claims by Class Members against the Released Parties on the merits and with prejudice; and (iv) enjoining Class Members (including Petitioners) from instituting, commencing or prosecuting any action or proceeding asserting any of the Settled Claims against any of the Released Parties.[11] (A640-46) Judge Pollack retained exclusive jurisdiction over all matters relating to the litigation including the "administration, interpretation, effectuation or enforcement of" the Settlement Agreement as incorporated by the Final Judgment. (A648)

---

[11] On November 20, 1995 Judge Pollack also entered extensive Findings of Fact and Conclusions of Law (A592) wherein he determined that certification of the Class was appropriate because the Class satisfied each element of Federal Rule of Civil Procedure 23(a), including the requirements of adequate representation and typicality, as well as those of Federal Rule of Civil Procedure 23(b)(3).

(iii) Petitioners' Post-Judgment Motion

Subsequent to entry of the Final Judgment, Judge Pollack addressed the motions of various Class Members, including the Tolands, pursuant to Rules 6(b) and 60(b) for extraordinary relief from the Final Judgment and permission to opt out belatedly. The Tolands, who were purchasers of Energy Income Limited Partnerships, petitioned the District Court for an order declaring that the Order and Final Judgment is not binding as to them—notwithstanding that they had failed to opt out by the October 30 deadline and thus are members of the Class bound by the Order and Final Judgment including the injunction contained therein against prosecuting any Settled Claims against PSI in any forum.

Because the Class defined by the Order and Final Judgment excludes investors whose claims were previously settled or finally adjudicated, individually or on a class-wide basis, the Tolands would be members of the Class only if they had validly opted out of the settlement class previously certified by Judge Livaudais of the Eastern District of Louisiana in *In re Prudential-Bache Energy Income Partnerships Securities Litigation*, MDL 888 (the "EI Class Action"). If the Tolands did *not* validly opt out of the EI Class Action, then they would be members of *that* class (and thus bound by the injunction in *that* action). Through the course of this litigation, the Tolands have persistently attempted to camouflage the underlying facts by offering contradictory statements regarding whether or not they validly opted out of the EI Class Action.[12]

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[12] The Tolands persist in their double-talk on this issue in their Petition to this Court. For example, the Tolands characterize themselves in the initial question presented as having "already opted out" (Pet. at i) of the prior class action. However, at page 6 of their Petition, the Tolands claim that they never "submitted a new opt out form" and "did not opt out of the second Louisiana MDL settlement." Yet, two pages later they state again that they "had already opted out of the Louisiana MDL to pursue individual arbitration" (Pet. at 8).

(footnote continued on following page)

Assuming, *arguendo*, that the Tolands validly opted out of the EI Class Action and are thus members of this Class, they argued that their failure personally to receive the mailed Class Notice renders the Final Judgment void as to them.[13] PSI conceded that the Tolands were not on the mailing list utilized by the Claims Administrator (A1225) because the data base used to prepare that list showed them to be members of the EI Class (A1227-28), a fact confirmed by the EI Class Claims Administrator (*id.*).[14] In fact, they were mailed a check in set-

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Although there is serious doubt that the Tolands did, in fact, validly opt out of the EI Class Action, PSI argued below that the answer to that question is in any event irrelevant to the issue of whether the Tolands can continue to prosecute their arbitration against PSI. If the Tolands did in fact validly opt out of the EI Class Action, they are then members of the Class certified by Judge Pollack and thus bound by the Order and Final Judgment, including the provision barring the continued prosecution of Settled Claims. If, however, they did not validly opt out of the EI Class Action, they are then members of the class certified by Judge Livaudais and thus barred by *that* settlement from pursuing further arbitration proceedings. In *either* scenario, PSI argued that the Tolands are enjoined from the continued prosecution of their arbitration against PSI. There is no third alternative.

13 The Tolands' dilemma is this: they *must* argue that they validly opted out of the EI Class, or else they have no excuse to be in arbitration at all. However, once they make that argument, they find themselves squarely in the Class below. Not liking that result (and apparently wholly unconstrained by any concept of truth), they then switch to the argument that they did *not* opt out of the EI Class. While they may believe that this helps them with their instant dilemma, they overlook the fact that it of course leaves them enjoined by Judge Livaudais from continuing their apparently much-desired arbitration. Checkmate!

14 Upon being informed during the proceedings below that the Tolands did not receive a direct mailing of the Class Notice, PSI commenced an investigation as to why this occurred. The November 3, 1995 Affidavit of G. Peter Buchband [of the Garden City Group, the Class Counsel-selected, court-approved Claims Administrator] Concerning Mailing and Publication of Notice to the Class (Pet. App. at 28) details the court-ordered mailing process and the cooperation provided by PSI. Paragraph 3 thereof notes, correctly, that PSI excluded from the data provided to the Garden City Group all investors who were ineligible to par-

tlement of their claims in the EI Class Action; a check that the Tolands assert they returned uncashed. (Pet. at 6)

While the Tolands did not receive direct mail notice of this Class Action, Mahlon Frankhauser, PSI's counsel in connection with the Tolands' arbitration, personally raised the issue of the Class Settlement with the Tolands' counsel on October 17, 1995—almost two weeks prior to the October 30, 1995 deadline for filing an exclusion and four weeks prior to the Fairness Hearing. (Pet. App. at 60) Mr. Frankhauser testified by affidavit that he discussed with the Tolands' counsel whether the Tolands had received the Class Notice; that he cautioned counsel that the opt-out date was October 30, 1995; and that he recommended the Tolands' counsel call a PSI in-house lawyer (whose name and telephone number he provided) for further details regarding the Class Action. (*Id.*) *The Tolands' counsel admitted that this conversation occurred* but disputed the precise details. (A1494) Although the Tolands' counsel was thus admittedly on sufficient notice that he should make further inquiry and take steps to exclude his clients from the Class if they wished to continue to pursue their claims independently, *he took no such steps*. The dialogue between Judge Pollack and the Tolands' counsel illustrates counsel's jaundiced view of his duty to inquire about

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ticipate by reason of membership in classes with which PSI had previously settled. PSI's investigation showed that the Tolands were excluded from the mailing list because the data base used to prepare that list showed them to be members of the EI Class — a fact subsequently confirmed by the EI Claims Administrator. (A1227-28) The Tolands (who sometimes claim to have opted out of the EI Class (*e.g.*, Pet. at 8) and sometimes claim not to have opted out of the EI Class (*e.g.*, Pet. at 6)) never disclosed their "I opted out/I didn't opt out" of the EI Class shenanigans to PSI, to the arbitrators or to Judge Pollack. Nor had they sought an order from Judge Livaudais "correcting the records" in the EI Class Action, which show that they are members of that class barred by that settlement from pursuing further arbitration proceedings against PSI. They simply proceeded with their arbitration, saying whatever they needed to say whenever it suited their purposes *du jour*.

the Settlement on behalf of his clients after being put on actual notice:

> "THE COURT: What effort did you make to get the notice or to find out whether you were making a big mistake on your client's behalf?
>
> Did you make any effort to get a copy of the notice so that you can satisfy your client's interests that you were not making a—something I keep on telling my law clerks—don't speculate, don't presume, don't do any of the other things other than look and listen.
>
> Now, you did nothing about looking and listening, did you? Did you just say, 'Okay, I might as well forget it'?
>
> MR. DUNCAN: No, your Honor.
>
> THE COURT: Tell me about it.
>
> MR. DUNCAN: I was not put on notice that we needed to check it out. *You put no affirmative duty or I had no affirmative duty to do that.*
>
> * * *
>
> THE COURT: Let me ask you this question:
>
> You're familiar with the line of cases and the rule of law that the only obligation of clients' counsel and clients' interest is to give a reasonable notice in the most practical way, and you're familiar also with the fact that a number of cases have decided that if that notice falls by the wayside in a few cases here, there and everywhere, that i[t] does not affect the requirements under Rule 23.
>
> Now, with that knowledge, legal knowledge, on your part, what position do you really have here because you didn't apprehend exactly what Frankhauser was telling and you did nothing to follow it up, just tell me where you come in that circle of events.

> MR. DUNCAN: I'd be glad to, your Honor. I was relying on Rule 23. *I was relying on the fact that if my client was really involved, that he would get a notice . . . .*" (A1495-97)[15]

Unpersuaded by this ostrich-like behavior of their chosen counsel, Judge Pollack denied the Tolands' motion for relief from the Final Judgment by Order dated January 23, 1996. (Pet. App. at 43)

(iv) The District Court's Opinion

Judge Pollack issued a sixteen-page Opinion dated February 1, 1996, supplementing his orders on the various belated opt-out motions including the Tolands'. (164 F.R.D. 362)[16] At the outset, he addressed the due process requirements for notice of class action settlements. Relying on this Court's opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), he held that due process is afforded through "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (A1640) Citing well-established authority from various circuits, Judge Pollack further held that "for the due process standard to be met, it is not necessary that every class member receive actual notice, so long as class counsel acted

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[15] The Tolands' counsel continues this sophistry in the Petition when he boldly asserts that Mr. Frankhauser's mentioning of "one more state [sic] class action was not the equivalent of mentioning another MDL. . . ." (Pet. at 14), apparently confusing a kind of action with a means for centralizing several different actions. Of course, the focus below was not on what Frankhauser *said* but on what the Tolands' counsel *did* or *failed to do* in response. *See infra* p. 20 n.19, p. 24.

[16] The Tolands, who improperly include in their Appendix materials *dehors* the Record (*e.g.*, Pet. App. at 63), did not bother to append Judge Pollack's February 1, 1996 opinion—as mandated by Supreme Court Rule 14.1(i)(i).

reasonably in selecting means likely to inform persons affected." (A1641)

Judge Pollack confirmed his earlier finding that the form of the Notice and the procedures for its dissemination comported with due process. (A1641) The mailing of class notice to each identifiable class member whose address could reasonably be located, combined with published notice in national newspapers, as occurred here, is a virtually universal procedure that "has been given wide-spread approval in other class actions." (*Id.*)

Judge Pollack recognized that notwithstanding the propriety of these commonplace notice procedures, a court retains discretionary power to allow claimants to file late opt-out requests pursuant to Rules 6(b), 60(b) and 23(d) (A1642), but only upon a showing of "excusable neglect," and then only after considering "the interests of the movants, the interest of the defendants, and the impact of granting the requested extensions on the Settlement itself." (A1643)

Judge Pollack held that Class Members who, like the Tolands, did not receive the mailed Class Notice are nevertheless bound by the Final Judgment because actual receipt of mailed notice by each class member is not a requirement of due process. (A1643) Furthermore, he rejected the argument that the Tolands' prior commencement of an arbitration against PSI indicated their preference to pursue claims against PSI individually and thus justified their failure to opt out and entitled them to some form of supplemental notice. Rather, he held that the mere "pendency of an individual action neither excuses failure to file an exclusion from a class action nor entitles the Class Member to notice above and beyond that due other Class Members." (A1646) Finally, Judge Pollack held that by electing not to "blow" the Settlement, PSI had bargained for the very finality the Tolands were seeking to undermine and thus would be severely prejudiced if they were granted the relief they sought. (A1646-47) In this regard,

Judge Pollack noted that granting leave to file untimely exclusions "would undermine the finality of judgments" and "would discourage settlement of such actions." (A1649)

(v) The Decision of the Court of Appeals

The Tolands thereafter appealed to the Court of Appeals.[17] On December 27, 1996, the Court of Appeals unanimously and summarily affirmed the denial of the Tolands' motion. In an unpublished opinion (Pet. App. at 1), the Court of Appeals held that in addressing the belated opt-out motions of the Tolands and others, the District Court properly considered the prejudice to PSI caused by additional late opt-out requests as "such late claims increase the liability exposure [to PSI] that the settlement was intended to limit." (Pet. App. at 7)

The Court of Appeals further held that the Tolands' omission from the mailing list was not dispositive because they were afforded publication notice and received personal notice prior to the expiration of the opt-out deadline. (Pet. App. at 14) Finally, the Court of Appeals held that PSI's previous agreement to arbitrate with the Tolands did not insulate them from the requirement of opting out—as the District Court had held. (*Id.*) The Tolands did not petition for rehearing or for *en banc* consideration.

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[17] Judge Pollack ruled against most of the Class Members seeking permission belatedly to opt out of the Class (although he granted relief to four Class Members on PSI's consent (A1 - R.339; A1 - R.388)). Six appeals from these orders (including the Tolands') were taken and consolidated in the Court of Appeals. Neither the Tolands nor any other Class Members timely appealed from the November 20, 1995 Final Judgment certifying the Class and approving the Settlement. Consequently, the factual findings and legal conclusions embodied in the Final Judgment were not properly before the Second Circuit, which dismissed as untimely the one appeal (not by the Tolands) purporting to be from the Final Judgment. (Pet. App. at 54)

SUMMARY OF ARGUMENT

This case is a paradigm of the type of fact-specific appeal that is unworthy of the exercise of this Court's certiorari jurisdiction. The Petition does not identify, nor does there exist, any ground upon which a writ of certiorari should be granted. None of the questions purportedly raised by this Petition presents either a conflict among the circuits, a conflict between the ruling of the Court of Appeals and any ruling of this Court, or any otherwise important and unresolved federal question of general or widespread applicability. To the contrary, Petitioners simply aver that well-settled and routinely followed law regarding class action settlement notification was misapplied to the unique (and somewhat bizarre) facts of their particular case by Judge Pollack whose putative error was not corrected by the Court of Appeals. They invite this Court to conduct yet a third review of the extensive factual record for error; to second-guess the conclusions reached by both courts below, *viz.*, that they have not established their entitlement to relief under Rules 6(b) or 60(b) which is discretionary in any event. The further factual review that Petitioners seek is plainly not deserving of a writ of certiorari. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Our federal court system provides for one level of judicial determination (the District Court) and one level of review for error, *vel non* (the Court of Appeals). Beyond that, there is no further review for mere error (as opposed to certiorari), and that is all that Petitioners seek.

Nor are the fact-specific issues which the Petition identifies for review meritorious on the record presented. The Tolands admit (Pet. at 9) that they never raised the issue of inadequate representation in the Court of Appeals and thus that Court never addressed it below. They also fail to identify any support whatsoever for their suggestion that their interests were inadequately represented. Moreover, on the notice issue,

despite their failure to receive the mailed notice, they are forced to concede (Pet. at 13-14) that their counsel was put on actual notice of the existence of the class action Settlement in this case nearly two weeks before the opt-out deadline, and four weeks before the Fairness Hearing, but inexplicably took no steps to opt his clients out or make any further inquiry. On this uncontroverted factual record, no extensive citations are required for the proposition that the courts below were correct in finding that the Tolands' due process rights were not violated. Even if, *arguendo*, the process did not work for the Tolands, there was nothing wrong with the process itself. There is simply no basis upon which a writ of certiorari should issue.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' DECISION RAISES NO ISSUE WORTHY OF THIS COURT'S CONSIDERATION AND WAS CORRECT IN ANY EVENT

The unworthiness of this case for review by this Court is demonstrated, at the outset, by a series of concessions that the Tolands are obliged to make in their Petition. Despite the fact, for example, that the very first question purportedly raised by the Petition is whether the Tolands' due process rights were violated by their allegedly inadequate representation by the Class Representatives (which resulted in their inclusion in the Class definition), the Tolands are constrained to concede that they failed to raise that issue in the Court of Appeals (Pet. at 9) and have therefore waived it. *See EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (per curiam) (this Court "refrain[s] from addressing issues not raised in the Court of Appeals").

The Tolands' second question presented relates to whether their due process rights were "further" violated by their fail-

ure to receive "written" notice of the proposed class action Settlement. The Tolands are again forced, however, to acknowledge (as they did in the courts below) that thirteen days prior to the expiration of the opt-out deadline, they (through their counsel) were put on actual notice of the existence of the class action proceedings but took no steps to opt themselves out of the Class or make any further inquiry. (Pet. at 7, 14) Given these two concessions, it is clear that no issue of due process arises, no important unresolved federal issue is presented and no intercircuit controversy is even attempted to be claimed. The Tolands simply screwed up.

Even if the Tolands had not waived the question of whether their interests were adequately represented by failing to raise it in the Court of Appeals, they offer no authority (much less conflicting authority) to support their legally unsupported—and factually incorrect (*see infra* note 20)—(and truistic, but irrelevant) assertion that "[c]ertifying a class action to afford opted-out account holders *less* than they could have received through previous class litigation does not serve their interests." (Pet. at 9)

First, as discussed *supra*, there is substantial doubt that the Tolands ever validly opted out of the EI Class Action; indeed, even in their Petition to this Court they continue the same duplicity on this issue which they previously exhibited to the arbitrators, PSI and both courts below. (*E.g.*, Pet. at i, 6 and 8) Second, even assuming *arguendo* that they validly opted out of the EI Class Action, their inclusion in the Class is hardly evidence of inadequate representation because like all Class Members, the Tolands were afforded the *opportunity* to opt out of the Class.[18] Their failure to avail themselves of

[18] In affording Class Members, including the Tolands, the opportunity to opt out of the Class as required for class actions certified under Rule 23(b)(3), this case does not present the issue raised in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994), and *Adams v. Robertson*, 117 S. Ct. 1028 (1997). In those recent cases, this Court granted (but ultimately dismissed) writs of certiorari to review the question of whether due process requires that proposed class members have an opportunity to

this mechanism simply does not rise to a deprivation of due process and thus is not worthy of this Court's review.[19]

Third, the Tolands base their claim of inadequate representation on an alleged antagonism of interests between themselves on the one hand and the rest of the Class on the other. (Pet. at 8) This perceived antagonism, however, is rooted solely in the Tolands' dissatisfaction with a mistaken view of the amount of their potential recovery under the Settlement when compared with the amount they claim they would have

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opt out of the certification and settlement of a nationwide state court class action. Unlike the class members in those cases, however, the Tolands and all Class Members herein were afforded the opportunity to opt out if they wished to pursue their claims against PSI individually; indeed, approximately 5800 Class Members availed themselves of this option. Accordingly, in light of the systemic denial of any opt-out opportunity in both *Ticor Title* and *Adams*, those petitions presented far stronger issues for review than does the instant one. Nevertheless, this Court dismissed its writ of certiorari as improvidently granted in each case and, in *Ticor Title*, noted that where the constitutional question presented is of great practical importance only to the litigants (and hypothetical as to everyone else), it "is ordinarily not sufficient reason for . . . granting certiorari. . . ." 511 U.S. at 122. Viewed another way, the class members in *Ticor* and *Adams* complained that they were *denied* precisely what the Tolands were *afforded*, *viz.*, an opportunity to opt out. Those class members argued that the denial of an opportunity to opt out constituted a denial of due process—*i.e.*, they wanted what the Tolands got. Even if it was appropriate to have granted certiorari in those cases, it would be wholly inappropriate to grant the Petition of the Tolands who received what petitioners in *Ticor* and *Adams* recognized as the paradigm of due process.

[19] Indeed, on this factual record, the only questionable representation received by the Tolands was that of their arbitration (and Supreme Court) counsel who admits that he was informed of the Settlement thirteen days prior to the opt-out deadline, but took no action to clarify whether his clients were Class Members or otherwise inform himself in the premises. (A1495-96) *See Langford v. Devitt*, 127 F.R.D. 41, 44-45 (S.D.N.Y. 1989) ("[U]nlike a layman, [petitioner's counsel] was then in a position to understand the significance and potential effects of the class action. . . . He was also in a position to understand the significance of not having received formal notice and how to correct that problem.")

recovered in the EI Class Action.[20] (Pet. at 8) Pretermitting the faultiness of this comparison, and that the Tolands waived any objection to the fairness of the Settlement by failing to object at the Fairness Hearing or take a timely appeal from the Final Judgment, we are aware of no case that has held that dissatisfaction with the amount of recovery under a class action settlement is sufficient to demonstrate inadequacy of representation *per se*. In any event, the individual and fact-specific nature of this issue is not worthy of this Court's time.[21]

Nor does the second question purportedly presented by the Petition raise any issue worthy of this Court's consideration. The Tolands do not question the procedural adequacy of the everyday, garden-variety, prototypical notice program employed here by Judge Pollack; nor could they. Individual

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[20] The Tolands' assertion in this regard not only highlights the fact-specific nature of their Petition but also points out the evil of citing matters *dehors* the Record. At page 63 of their Appendix, Petitioners attach a letter (written after issuance of the Second Circuit's mandate and not seen by PSI prior to its receipt of the Petition) which recites an estimate that the Tolands would receive approximately 35% of their Weighted Recognized Loss. This may well be a typographical error as Judge Pollack has since signed an order directing the Claims Administrator to mail checks to claimants for approximately 51% of their Weighted Recognized Loss. The Tolands' share would thus be in excess of $60,000 or almost 20% *more than* their participation in the EI Class settlement. The Tolands would also be eligible to participate in additional settlements with other defendants in MDL 1005.

[21] To the extent that the Tolands' reference (*dehors* the Record) to 16,000 similarly situated investors who opted out of the EI Class Action (Pet. at 8, 12) is meant to suggest that this Petition is of significance to any Class Members other than themselves, they are misleading this Court. The Tolands are the *only* Class Members who petitioned Judge Pollack for extraordinary relief from the Settlement on the ground that they had opted out of the EI Class Action and therefore should not be members of this Class. The remaining 16,000 opted-out EI Class members presumably fell within an exclusion from the Class definition, opted out of the Class or were otherwise satisfied with their Settlement recovery.

first-class mailings to reasonably identifiable Class Members as supplemented by an extensive published notice program plainly constitutes "the best notice practicable under the circumstances" as required by Rule 23, due process and the teachings of this Court. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

Instead, the Tolands maintain that the Final Judgment was void as to them because they did not *receive* the mailed Notice. In support of this proposition, the Tolands make the incredible assertion that the rulings below are inconsistent with the rulings of this Court in *Mullane* and *Eisen*. The Tolands' argument fundamentally misinterprets the holdings in those cases.

Neither *Mullane* nor *Eisen* established a due process right to *receive* class action notice. Rather, in both cases, this Court stated that in order for the due process standard to be met, the notice procedures must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane*, 339 U.S. at 314; *Eisen*, 417 U.S. at 174. Further, in endorsing first class mail as the means of accomplishing that notice, this Court recognized that "reasonable risks that notice might not actually reach every beneficiary are justifiable." *Mullane*, 339 U.S. at 319.

The unanimity of the Courts of Appeals in interpreting *Mullane* and *Eisen* on this issue is clear. *See, e.g., Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (noting that neither *Mullane* nor *Eisen* requires actual receipt of notice); *Peters v. National Railroad Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (relying on *Mullane* and holding that "the due process clause does not amount to a guarantee of notice to a class member"); *Weigner v. City of New York*, 852 F.2d 646, 649-52 (2d Cir. 1988) (holding that compliance with the *Mullane* standard "does not mean that all risk of non-

receipt must be eliminated"), *cert. denied*, 488 U.S. 1005 (1989); *Zimmer Paper Products Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 91-93 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985) (finding no obligation to verify receipt of notice by mail to satisfy due process); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979) (upholding validity of notice procedure even though mailing list did not contain every member of class), *cert. denied*, 452 U.S. 905 (1981).[22]

The Tolands' reliance on *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), is wholly misplaced. Unlike the proposed list in *Nissan*, which omitted "substantial numbers of the certified class," *id.* at 1095, PSI's data base contained the names and addresses of virtually all eligible Class Members. The fact that the data base was not one hundred percent error-free does not render the notice procedure invalid. *See Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. at 1345 (holding that verification of addresses on mailing list not required to satisfy Rule 23 or due process). Moreover, supplemental notice was provided to absent class members through publication in national newspapers.[23]

The Tolands also urge that they are somehow entitled to special notice because of their status as claimants in a pending arbitration. (Pet. at 12) Once again, however, the Tolands offer no legal authority for their argument nor evidence of a

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[22] *See also Gross v. Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345 (M.D. Fla. 1995); *Lake v. First Nationwide Bank*, 156 F.R.D 615, 628 (E.D. Pa. 1994); *Hallman v. Pennsylvania Life Insurance Co.*, 536 F. Supp. 745, 748 (N.D. Ala. 1982); *Valente v. Pepsico, Inc.*, 89 F.R.D. 352, 363 (D. Del. 1981); *In re U.S. Financial Securities Litigation*, 69 F.R.D. 24, 46-47 (S.D. Cal. 1975).

[23] The sufficiency of the notice program is underscored by the overwhelming response of this 100,000-plus member Class. Over 274,000 Notices were mailed to prospective Class Members. (Pet. App. at 4) An additional 10,926 parties responded to the Published Notice and received the full Notice by mail. (Pet. App. at 5) Approximately 5800 Class Members filed timely opt outs and over 100,000 Class Members filed Proofs of Claim to participate in the Settlement.

significant (or any) conflict among the circuits or between the Court of Appeals and this Court. Nor could they, as this proposition has been soundly rejected. *See Penson v. Terminal Transport Co.*, 634 F.2d 989, 996 (5th Cir. 1981) ("A judgment or a consent decree entered in a class action can bind the absent class member even though the member had filed a claim or instituted a personal suit before the decision in a class action."); *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 514 (S.D.N.Y. 1973) (noting that class members were entitled "only to such notice as the [other] members of the class were entitled to and [they] did not gain additional rights because they had instituted an independent action"), *aff'd per curiam*, 490 F.2d 1183 (2d Cir. 1974).

In any event, the Tolands' contention that their due process rights were violated is undermined by their concession of the existence of the conversation between their counsel and PSI's counsel thirteen days prior to the opt-out deadline. Thus, even if this issue were otherwise of significance or the basis of any conflict among the circuits, it is hardly best presented to this Court in the context of a case in which the decisions of the courts below were based on facts unique to this case, including the failure of the very counsel who would argue this case in this Court to satisfy his professional obligations to his clients in the first place—which is, after all, the reason for their predicament. *See Langford v. Devitt, supra*, 127 F.R.D. at 45 (holding that class members "cannot rely on [their counsel's] own inaction to justify late exclusion").

In short, the notion that the due process standard was not met by the routine, ordinary and non-controversial notice program adopted by Judge Pollack (now in his 30th highly acclaimed year on the federal bench[24]) and unanimously

[24] Judge Pollack's remarkable judicial service is well-known to this Court. *See* 909 F. Supp. LXV (1995), reporting the presentation to him of the Edward J. Devitt Distinguished Service to Justice Award and noting Judge Pollack's "talent for rapid resolution of large and complex cases, [his] ability to unclutter, to clear fog, to thrive under pressure, [and] to persevere until the hardest case is done." *Id.* at LXXV.

approved by the Court of Appeals is not only contrary to *Mullane* and *Eisen*, but to the Record in this case. The Tolands have not presented any ground upon which this Court should issue a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 25, 1997

Respectfully submitted,

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No. 96-1538

In The

Supreme Court of the United States

October Term, 1996

JOHN D. TOLAND and CHRISTAL TOLAND, *as husband and wife and d/b/a the John Toland Company,*

Petitioners,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

This supplemental brief is being filed pursuant to Rule 15.8 of the Rules of the Supreme Court of the United States, which says that a party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to intervening matter not available at the time of the party's last filing.

After the Tolands filed their petition for writ of certiorari on March 28, 1997, both the United States District Court for the Southern District of New York and the United States Court of Appeals for Second Circuit have denied the Tolands' motions for a stay. App. 68-71.[1] The Tolands sought, from those Courts, a stay of the requirement of the Southern District that the Tolands forthwith dismiss with prejudice their arbitration pending against Respondent Prudential Securities Incorporated ("PSI") (App. 44) until such time as their case was resolved by this Court.

(The Tolands presented their petition for writ of certiorari to the Southern District and argued that the petition presented two substantial questions; that good cause existed for the stay because the Tolands should not be required to dismiss their arbitration before exhausting the appellate process; and that the stay would be proper under Rule 62(d) of the Federal Rules of Civil Procedure and Rule 83(b) of the Federal Rules of Civil Procedure,

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[1] "App." means the Appendix to the Tolands' Petition for Writ of Certiorari and the Supplemental Appendix to this Supplemental Petition, which is numbered consecutively.

which permits a judge to regulate practice in "any manner consistent" with federal law, federal rules, and local rules. The Tolands also presented their petition to the Second Circuit and argued that the petition presented two substantial questions; that good cause existed for the stay because the Tolands should not be required to dismiss their arbitration before exhausting the appellate process; and that the stay was proper under Rule 27(c) of the Second Circuit Local Rules, which permits the Second Circuit to recall a mandate, and under Rule 41(b) of the Federal Rules of Appellate Procedure, which allows for a stay of a mandate.)

On the day that the Tolands' counsel received the Second Circuit's order denying the motion for stay, the Tolands' counsel also received a letter from PSI's counsel in which PSI's counsel asserted that the Tolands' failure to dismiss the arbitration was a "direct act of disobedience" of the Southern District and that, "Any adverse consequences resulting therefrom will have been self inflicted." App. 74. In the past, PSI's counsel had said that it would move before the Southern District for "contempt if warranted" if the Tolands did not dismiss the arbitration. A921-22.[2]

After receiving the above-mentioned order and letter, the Tolands' counsel wrote a letter to the American Arbitration Association dismissing the arbitration. App. 76. Therefore, the ultimate relief which the Tolands now seek

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[2] "A" means the Appellants' Appendix filed with the Second Circuit Court of Appeals in the appeal below.

has changed to include setting aside the dismissal of the arbitration and reinstating the arbitration.

NEIL CHAMBERLIN
Counsel of Record
DUNCAN & RAINWATER, P.A.
Three Financial Centre, Suite 500
900 South Shackleford
Little Rock, Arkansas 72211-3850
P.O. Box 25938
Little Rock, Arkansas 72221-5938
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SUPPLEMENTAL APPENDIX

Page

ORDER OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (APRIL 8, 1997) .....App. 68

ORDER OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (MAY 6, 1997) .....App. 69

LETTER FROM MATHIAS E. MONE TO NEIL CHAMBERLIN (MAY 9, 1997) .....App. 74

LETTER FROM NEIL CHAMBERLIN TO KIMBERLY L. EMERSON (MAY 13, 1997) .....App. 76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRUDENTIAL SECURITIES INCORPORATED	MDL Docket No. 1005 M-21-67(MP)
LIMITED PARTNERSHIP LITIGATION	ORDER NO. 110
	(Filed April 8, 1997)

An application having been made herein pursuant to Rule 62 [sic] the Federal Rules of Civil Procedure for a Stay of this Court's Order, that the Tolands shall forthwith dismiss their arbitration with Prudential Securities Inc. and other Prudential entities, until such time as this matter is resolved by order of the United States Supreme Court; and Prudential having submitted a Memorandum in opposition to the said Motion and no request having been made to the Court of Appeals for a Stay of its Mandate; and it appearing further that the applicants have failed to show a substantial question for certiorari and having failed to show that there is good cause for a Stay; it is

ORDERED, that the application for a Stay of this Court's requirement that the Tolands forthwith dismiss their arbitration with the Prudential entities until this matter is resolved by order of the United States Supreme Court, be and the same hereby is, in all respects, denied.

Dated: New York, NY
April 8, 1997

/s/ Milton Pollack
Milton Pollack
Senior U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

JOHN D. TOLAND and CHRISTAL TOLAND, as husband and wife and d/b/a the John Toland Company, Plaintiffs-Appellants,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION, Defendant-Appellee

Use short title

95-9209(L)
Docket Number

NOTICE OF MOTION

state type of motion

for Stay

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Neil Chamberlin
DUNCAN & RAINWATER
Three Financial Centre, Suite 500
900 South Shackleford
Little Rock, AR 72211-3850 Tele. (501) 228-7600

OPPOSING COUNSEL: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

See attached

Has consent of opposing counsel:

A. been sought?	[X] Yes	[ ] No
B. been obtained?	[ ] Yes	[X] No
Has service been effected?	[X] Yes	[ ] No

Is oral argument desired? [ ] Yes [X] No
(*Substantive motions only*) Nonsubstantive

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? [X] Yes No
B. by firm date of argument notice? [ ] Yes No
C. If Yes, enter date: Dec. 2, 1996

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [X] Yes [ ] No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion?
[ ] Yes [X] No

If No, explain why not:
This is a post-judgment motion.

Will the parties agree to maintain the status quo until the motion is heard? [X] Yes [ ] No
The Tolands will

Judge or agency whose order is being appealed:

Milton Pollack, United States District Court for the So. Dist. of N.Y.

Brief statement of the relief requested:

Stay of requirement of the court below (Hon. Milton Pollack) that the Tolands dismiss an arbitration with prejudice, until such time as the United States Supreme Court disposes of the Tolands' case. (The Tolands' petition for writ of certiorari is pending.)

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Neil Chamberlin
Signed name must be printed beneath

Neil Chamberlin

Appearing for:
(Name of party)

John D. Toland, et al.

Date

April 21, 1997

Appellant or Petitioner:
[X] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

ORDER

(Filed May 6, 1997)

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied

/s/ Ellsworth A. Van Graafeiland
per DGJ

/s/ Dennis Jacobs

5/6/97 /s/ Guido Calabresi per DGJ

Date Circuit Judge

Previous requests for similar relief and disposition: The Tolands moved before the court below (Hon. Milton Pollack) for the relief sought here, which Judge Pollack denied.

Statement of the issue(s) presented by this motion: Whether this Court will stay the order of Judge Pollack below, to the extent that it instructs the Tolands to dismiss a pending arbitration with prejudice, during the pendency of the review of the Tolands' case by the United States Supreme Court, with which the Tolands have filed a petition for writ of certiorari. Alternatively, whether this Court will recall its mandate pursuant to Local Rule 27(c) and stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

Brief statement of the facts (*with page references to the moving papers*): The Tolands were in arbitration against appellee Prudential Securities, Inc., when Judge Pollack entered a final order and judgment enjoining the Tolands from further prosecuting the arbitration. Affidavit, para. 2. They moved before Judge Pollack for relief from his final order and judgment, which he denied. Id. They appealed to this Court. Id. During the pendency of the appeal, Judge Pollack stayed the requirement in his order that the Tolands dismiss their arbitration with prejudice. Id. This Court affirmed Judge Pollack's judgment and issued a mandate. Id., para. 3. The Tolands again, but unsuccessfully, moved before Judge Pollack to stay his order while they sought Supreme Court review by way of a petition for writ of certiorari Id., para. 4. The Tolands have filed that petition, and it is now pending before the Supreme Court. Id.

Summary of the argument (*with page references to the moving papers*): This Court has jurisdiction to grant the Tolands' requested stay under 28 U.S.C. sec. 2101(f), which allows a court rendering a judgment to stay the judgment if it is subject to review by the Supreme Court

on writ of certiorari. Alternatively, this Court may recall its mandate pursuant to Local Rule 27(c) and may stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure upon a showing that the petition for writ of certiorari presents a substantial question and that there is good cause for the stay. Memorandum at 1-2.

The stay is warranted because the Tolands' petition for writ of certiorari presents two substantial questions. The first substantial question is whether the Tolands' inclusion in the class definition of the class action below (MDL 1005) violated their due process rights, given that they had already opted out of a previous class action in Louisiana (MDL 888) covering the same investments as those at issue below. The second is whether the Tolands' due process rights were violated by the class notice provisions of MDL 1005, which the Tolands contend did not amount to the best notice practicable under the circumstances. Id. at 2-3.

The stay is also warranted because the Tolands have shown good cause. Judge Pollack's order requires them to dismiss their arbitration with prejudice, but a Supreme Court reversal would allow the Tolands to resume their arbitration. A dismissal, therefore, would be premature and prejudicial to the Tolands. They should be allowed to exhaust the Appellate process before dismissing their arbitration. Id. at 3.

CAHILL GORDON & REINDEL
Eighty Pine Street
New York, N.Y. 10005-1702

(Letterhead Omitted In Printing)

May 9, 1997

Re: Toland v. Prudential
AAA # 71 13600185 93

Dear Mr. Chamberlin:

We are in receipt of your letters of April 28 and May 5 to Kimberly L. Emerson, Supervisor of Commercial Case Management with reference to the above matter.

For good order's sake, we wish to record that Prudential Securities Incorporated has not acquiesced in, excused or in any way ratified your clients' apparently willful failure and refusal to abide by the Order of the United States District Court for the Southern District of New York directing them to dismiss the referenced arbitration.

The District Court had jurisdiction over your clients and the subject matter of its injunction. You appealed the Order and lost. You thereafter asked Judge Pollack to stay the effectiveness of his Order and your motion was denied. In order [sic] words, you have no legal justification to delay compliance with the Court's Order.

In these circumstances, the request in your letter of April 28, 1997 that Ms. Emerson "not dismiss the case at this time" can only be viewed as a direct act of disobedience of the District Court's injunction. Any adverse consequences resulting therefrom will have been self inflicted.

Sincerely,

/s/ Mathias E. Mone
Mathias E. Mone

Neil Chamberlin, Esq.
Duncan & Rainwater
Three Financial Centre
Suite 500
900 S. Shackleford
Little Rock, AR 7221[sic]-3850

cc: Mahlon M. Frankhauser, Esq.
Ms. Kimberly L. Emerson

Duncan & Rainwater
A Professional Association of
TRIAL LAWYERS

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MICHAEL R. RAINWATER, P.A.
ROBERT A. RUSSELL, JR.
AMELIA MOSLEY RUBBELL
NEIL R. CHAMBERLIN
MICHELLE BANKS ODUM
J. STEPHEN HOLT

May 13, 1997

BY FACSIMILE: (972) 490-9008

Kimberly L. Emerson
Supervisor of Commercial Case Management
American Arbitration Association
1750 Two Galleria Tower
13455 Noel Rd.
Dallas, TX 75240-6636

Re: Toland v. Prudential
AAA #71 136 00185 93

Dear Ms. Emerson:

Today, we received an order from the United States Court of Appeals for the Second Circuit, in which the Court denies the Tolands' motion to stay the order of the United States District Court for the Southern District of New York requiring the Tolands to dismiss their arbitration. Based on the orders of the above two Courts, the Tolands dismiss the above-referenced arbitration. The Tolands' petition for writ of certiorari remains pending with the United States Supreme Court. If there is reason to revisit this issue after the Supreme Court rules on the petition, we will contact you at that time.

Sincerely,

/s/ Neil Chamberlin
Neil Chamberlin

cc: Mahlon M. Frankhauser, Esq. (By Facsimile: (202) 778-9100)
Matthias E. Mone, Esq. (By Facsimile: (212) 269-5420)